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Compelled Financial Support of a Bar Association and the Attorney's First Amendment Rights: A Theoretical Analysis

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Compelled Financial Support of a Bar Association and the Attorney's First Amendment Rights: A Theoretical Analysis.©†

". . . to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[1]
Thomas Jefferson

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† This article is dedicated to my parents, Isaac and Joan Rector. I would also like to thank Professors Stephen E. Kalish and Steven L. Willborn, Professors of Law, University of Nebraska College of Law, for their critiques and advice in earlier drafts of the article.

1. I. BRANT, JAMES MADISON: THE NATIONALIST 354 (1948).

I. INTRODUCTION

Over the past seventy-five years the Integrated Bar has been a major concern to the profession and continues to be the subject of rather heated discussion.[2] The integrated bar is an association that all attorneys must join as a precondition to the granting of the privilege to practice law.[3] Many states, including Nebraska, have such integrated bars.[4] Integration has come about through various means: legislation,[5] court rule,[6] or a combination of the two.[7] Regardless of the manner in

2. For example in a recent issue of the ABA Journal it was reported the California State Bar has just recently been allowed to levy membership dues. However, the measure also gives the state legislature review power over the bar and mandates a poll of the state's lawyers to determine whether membership in the state bar should be mandatory. *See* Silas, *Getting its Due(s)*, A.B.A.J. April 1, 1986 at 26. The state of California just recently completed the poll of its state bar members to determine their views toward the integrated bar and the mandatory bar dues. See REPORT BY THE AUDITOR GENERAL OF CALIFORNIA, RESULTS OF THE PLEBISCITE OF MEMBERS OF THE STATE BAR OF CALIFORNIA (May 1986); see also Keller v. State Bar of California, 181 Cal. App. 3d 471, 226 Cal. Rptr. 448 (1986) (held that first amendment principles prohibited state bar from requiring its members, as condition of practicing law, to contribute to support of political or ideological causes they opposed and which were not germane to purposes of State Bar Act); Petition of Chapman, 128 N.H. 24, 509 A.2d 753 (1986) (integrated bar would be precluded from lobbying on issues outside the scope of those responsibilities which justify compelling lawyers to belong to the association).
3. The integration movement is considered to have officially begun with an address given by Herbert Harley, founder of the American Judicature Society, to the Lancaster County Bar Association in Lincoln, Nebraska on December 28, 1914. *See* D. MCKEAN, THE INTEGRATED BAR 34 (1963); Kalish, *The Nebraska Supreme Court, the Practice of Law and the Regulation of Attorneys*, 59 NEB. L. REV. 555, 556 (1980).
4. Other cases and commentary have referred to the integrated bar as a unified bar, organized bar, state bar, and incorporated bar. Regardless of the name attached to it the integrated bar can be defined as an association of attorneys to which membership is required as a precondition to practicing law in the state. *See* MCKEAN, *supra* note 3, at 21-22. *See also* Petition of Chapman, 128 N.H. 24, 27, 509 A.2d 753, 756 (1986).
5. States integrated through legislation and the years of their integration include: Alabama (1923), Alaska (1955), Arizona (1933), California (1927), Idaho (1923), Mississippi (1930), Nevada (1929), New Mexico (1925), North Carolina (1933), North Dakota (1921), Oregon (1935), Puerto Rico (1932), South Dakota (1931), Utah (1931), and Washington (1933). *See* AMERICAN JUDICATURE SOCIETY, CITATIONS AND BIBLIOGRAPHY ON THE INTEGRATED BAR IN THE UNITED STATES 1-2 (1961) [hereinafter BIBLIOGRAPHY].
6. States integrated through court rule and the years of their integration include: Florida (1949), Missouri (1944), Nebraska (1937), Oklahoma (1939), and the Virgin Islands (1956). *See* BIBLIOGRAPHY, *supra* note 5, at 1-2. *See also* Brookens, *Judicial Incorporation of the Bar*, 12 ROCKY MT. L. REV. 209-14 (1940); Jones, *Bar Integration by Supreme Court Rule*, 24 MARQUETTE LAW. REV. 90-92 (1940); *Bar Integration Endorsed*, 4 J. AM. JUD. SOC. 44-47 (1920)(Extended discussion of the power of the highest court of a state to integrate by rule of court).
7. States integrated through a combination of statute and court rule and the years of their integration include: Kentucky (1934), Louisiana (1940), Michigan (1935),

which the bar has become integrated there remain, however, common characteristics of the integrated bar.

One such characteristic is that members of the bar must pay annual dues to the association to support its activities.[8] Integrated bars are involved in many activities that range in scope and purpose. For example, integrated bars oversee many aspects of the profession including admission, discipline and prevention of the unauthorized practice of law.[9] The bar provides educational programs for its members and the public. In addition, many bars lobby their state legislatures on issues that may impact upon the bar, the lawyer and the profession. However, the single most objectionable characteristic of the integrated bar, to many, is the compelled financial support of its activities.

This article addresses the historical development of the integration movement and the concerns that have been advanced by the proponents as well as the opponents of integration. Focusing primarily on the challenges to bar integration there will emerge an evolution of the attack on the integrated bar. This evolution begins with the opposition to the integration movement, followed by the total attack on the integrated bar, and finally the acceptance of an integrated bar of limited activities. I will also illustrate how the integration movement has been quite a circuitus one; always returning to the issue of which activities are appropriately those of the bar association. After discussing the historical development of the integrated bar, I will address the more recent challenge to the activities of the bar.

The current challenge to the integrated bar is the expenditure of membership dues in a manner inconsistent with a dissident member's beliefs. Decisions of the Supreme Court have addressed such a challenge in the labor context and provide guidance to the same issue presented in the context of an integrated bar association. I will address this current objection to the integrated bar, striving to incorporate the recent cases and commentary into a manageable summary and analysis of the charges against the integrated bar.

I conclude that the compelled financial support of a bar associa-

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Texas (1939), Virginia (1938), West Virginia (1945), Wisconsin (1956), and Wyoming (1939). *See* BIBLIOGRAPHY, *supra* note 5, at 1-2.

8. The annual dues for membership in the Nebraska State Bar Association are set according to a sliding scale depending on the length a member has been in practice and the status of the individual. Current dues are: Active member - $150.00; Judicial - $150.00; Junior Active - $75.00; Senior Active - $30.00; Inactive - $20.00 and Military is complimentary. *See also* REPORT, *infra* note 9.

9. The Nebraska State Bar Association, according to the 1985 annual report, was made up of thirty-two committees in five divisions, ranging from the committee on the annual meeting to the committee on forms standardization. *See* NEBRASKA STATE BAR ASSOCIATION, THE BAR DIRECTORY 275 (1985) (The annual report and directory of the Nebraska State Bar Association) [hereinafter REPORT].

tion's activities that do not further a compelling governmental interest impermissibly violates an objecting member's first amendment rights. A proposed framework for analyzing the activities of the bar association to distinguish between the legitimate activities (and the concomitant financial support of those activities), and those activities which are not proper bar association activities will then be explored. The framework of analysis, which I propose, is a functional approach that requires those activities which must be financially supported by all bar association members be necessary to assure the proper functioning of the judicial process. Such a test is one of strict necessity. Those activities of the bar that assure the proper functioning of the judicial process further compelling state interests and justify the resulting first amendment infringement; those activities that are not strictly necessary to insure the functioning of the judicial process are not compelling state interests and the bar connot compel their financial support over the objection of a dissident member. This discussion of the issue is more substantive; however, there remains a procedural aspect to the compelled financial support of a bar association's activities.

If the conclusion is reached that a dissident bar member cannot be compelled to financially support bar association activities which she opposes, then there remains the issue of what is the proper remedy. Short of prohibiting a bar from engaging in such activity,[10] a system must be established which will apportion the dues supporting such activities. There must be a procedure devised which will assure that the objecting member is paying for the activities of the bar that further a compelling state interest, yet it must also provide for a process of apportioning the dues and returning that portion which represents the pro rata share spent unconstitutionally. This article proposes a procedure that insures that unconstitutional bar expenditures are not being compelled over objection and that a constitutional process is developed that will honor the constitutional rights of the dissident bar member.

I propose a procedure which informs all members of their right to object to bar expenditures and places this burden on the bar association. Additionally, the procedure would require the bar to place the dues of an objecting member into an escrow, or similar interest bearing account until an accounting could be conducted. After the accounting, the bar association could assess to all members a percentage of its costs representing those activities that have been determined to further a compelling interest. All other activities of the bar must be financed by voluntary contributions or through sources other than compelled exactions from dissenting members. During the first year in operation, the percentage of the dues that are appropriately com-

10. Such activity includes more than mere legislative lobbying.

pelled would be set-off against the dues held in escrow, with the balance being returned along with the accrued interest to the dissident member. In subsequent years, the dues assessed to dissident members would be the amount which represented compelled assessments in the previous year, with any shortfall being charged to the dissident and any excess being returned, again with interest.

This procedural safeguard would be the least restrictive means of furthering the compelling governmental interests served by some of the activities of the integrated bars.

It should be pointed out that there are other objections to the integrated bar which will not be addressed in this article. Such asserted challenges include: the freedom of non-association which is infringed through compelled membership;[11] challenges involving taxation and appropriation of bar dues without legislative action;[12] and separation of powers concerns which are implicated through bar integration.[13] Due to limitations of space these challenges will not be discussed in this article.

II. HISTORICAL DEVELOPMENT OF THE INTEGRATED BAR

This portion of the article is not intended to be an exhaustive restatement of the events leading to the integration movement. It is, however, necessary background discussion to illustrate the evolution of the attacks on the integrated bar and the various forms those attacks have taken. In addition, an understanding of the development of the integration debate will be useful for a complete understanding of the current challenge to compelled financial support of bar activities.

As mentioned previously, the bar integration movement has undergone three distinct stages and has thus evolved from the total rejection of an integrated bar to the present acceptance of an integrated bar of limited functions. The evolution of the integration debate has been very circular. The question that remains unanswered after seventy-five years of discussion is what are the appropriate duties and

11. *See generally Compulsory Membership in a Bar Association*, 34 JUD. 100 (1950); Comment, *The Right of Ideological Nonassociation*, 66 CALIF. L. REV. 767 (1978); Note, *Constitutional Right of Non-Association—Abood v. Detroit Board of Education*, 14 WAKE FOREST L. REV. 633 (1978).

12. *See generally* Kalish, *supra* note 3 at 589-95. Ironically in a recent case involving compelled financial support of a bar's lobbying activities the bar defended the action urging that membership fees "are simply tax receipts which the government may spend as it likes." Keller v. State Bar of California, 190 Cal. App. 3d 471, 1196, 1214, 226 Cal. Rptr. 448, 464 (1986).

13. *See, e.g.*, Comment, *Separation of Powers: Who should control the Bar?* 47 J. URB. L. 715 (1969); Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law: A Proposed Delineation*, 60 MINN. L. REV. 783 (1976). For an excellent analysis of the separation of powers concerns with special emphasis on Nebraska see Kalish, supra *note 3.*

functions of the integrated bar associations? In this portion of the article, I discuss the evolution of this recurring theme throughout the integration movement.

Bar integration has been shaped through select court decisions, and extensive scholarly commentary. First a brief summary of the events leading up to the widespread integration of voluntary state bar associations will be discussed, followed by the major cases that have impacted upon the movement. The primary cases that have had an impact on the early stages of the integrated bars are *Lathrop v. Donohue*[14] and *Abood v. Detroit Board of Education*.[15] The *Lathrop* and *Abood* decisions will be discussed in the sections that follow.

A. Early Integration History

The integrated bar movement began in the early 1900s and is considered to have officially commenced as a result of a speech given by Herbert Harley in 1914.[16] Although the early integration movement is often characterized as a debate, the commentary during the formative years of integration history is noticeably skewed in favor of the integration proponents. This can be explained when one looks at the authors and the sponsors of the early commentary.

For example, Herbert Harley, who began the integration debate, had control of a very influential vehicle which was devoted to the integration of the voluntary state bar associations. As founder of the American Judicature Society, Harley was able to exert a great deal of pressure in favor of integration. Indeed, one need only scan the early issues of Judicature, published by the American Judicature Society, to get a sense of the position held by the American Judicature Society on bar integration.[17] Further, many of the authors that advocated the integration of voluntary associations were themselves members and officers of the voluntary associations. With the resources available to begin a campaign for integration, these sponsors influenced the movement tremendously.

The institutional sponsors of the early literature on integration were usually the voluntary bar associations which had a great deal to

14. 367 U.S. 820 (1961).

15. 431 U.S. 209 (1977).

16. *See supra* note 3 and accompanying text. Mr. Harley's address was entitled "A Lawyer's Trust: An Agreement for a Self-Governing and Responsible Bar." *See* Harley, *A Lawyer's Trust*, 29 JUDICATURE 50 (1945).

17. The American Judicature Society also prepared and published a bibliography on bar integration. The foreword of the bibliography claims to present both sides of the movement, however, most of the literature is favorable to the integration movement. Indeed most of the articles referenced were published by Judicature. This may be explained by the bias of the American Judicature Society or by the fact that early literature on bar integration was skewed towards integration. *See generally* BIBLIOGRAPHY, *supra* note 5.

gain through integration.[18] Through integration, voluntary associations would be strengthened "by bolstering memberships, finances, and influence."[19] Most of the voluntary associations published journals that provided the integration proponents with easy access to print media. With this unbalanced state of the early commentary it is understandable why so few attorneys opposed the integration of their voluntary state bars.

A number of arguments have traditionally been advanced for and against the integrated bar.[20] The arguments in favor of an integrated bar can be broken into two components: first, arguments based upon the public interest; and second, arguments based upon the self-interest of the bar associations and attorneys.

This first category includes the following reasons for bar integration: improving the competency, standards, and image of the profession; effective discipline and enforcement of ethical standards; improving the administration of justice; protecting the public interest by monitoring legislation; furthering the bar's duties of public responsibility (e.g., client security funds, making legal services available, etc.); eliminating "freeloaders" in the profession (i.e., lawyers who do not fulfill their public responsibilities); and effectively promoting judicial reform legislation.[21]

The second category of arguments advanced for the integrated bar appeals to the self-interest of the bar association and the lawyer. Examples of arguments of this type include: increased membership in the bar and improved financial resources through integration; better participation, diversity of viewpoints and quality of work resulting from integration; elimination of clique control common in voluntary bar associations; improving public perception and attitudes regarding attorneys; improving the economic position of lawyers through the institution of minimum fee schedules; benefitting local voluntary bar associations; promotion of self-government and self-discipline by the

18. For example the Nebraska Bar Association, now the Nebraska State Bar Association, in 1933 established a special committee on integration of the bar. *See* 24 PROCEEDINGS OF THE NEBRASKA STATE BAR ASSOCIATION 41 (Thirty-Fourth Annual Meeting of Nebraska State Bar Association 1933).

19. Sorenson, *The Integrated Bar and the Freedom of Nonassociation — Continuing Seige*, 63 NEB. L. REV. 30, 35 (1983).

20. For a complete discussion of the pros and cons of bar integration see Curtis, *The Pros and Cons of an Integrated Bar*, 12 LAW SOC'Y J. 103 (1946-47); Harley, *Does $3 a Year Mean Regimentation*, 13 FLA. L.J. 39 (1939); Vogl, *Why Lawyers Should Oppose Bar Integration*, 20 DICTA 63 (1943); Wicker *Pros and Cons of an Integrated Bar*, 23 TENN. L. REV. 457 (1954-55).

21. Sorenson, *supra* note 19, at 36. Several of these justifications, while serving the public interest, also inure to the benefit of the bar and the self-interest of the members of the bar. And while many consider these activities to be proper, I believe that some of them raise serious constitutional problems, especially monitoring and promoting legislation.

legal profession through unification; providing the mechanism by which lawyers can speak with one voice on important public and social issues; and protecting lawyers by providing a mechanism to monitor legislation that may affect their professional interests.[22]

This category of pro-integration arguments is more likely to raise objections by dissident bar members than any other. These arguments, based upon the self-interest of the bar associations and the individual attorney, do not promote any governmental goals and therefore compelled financial support of activities that further them are likely to meet opposition. Activities which further the self-interest of the bar and the attorney without regard to the governmental interest in regulating attorneys are those that would fail the functional test proposed in this article.

Responding to the arguments of the proponents, the anti-integrationists also entered the debate with their own. Opponents of bar integration asserted a multitude of arguments supporting their position: compulsory membership in the bar deprived attorneys of the freedom of choice; integration was the equivalent to regimentation; integration increased bureaucracy and the tax burden; integration deprived attorneys of property without due process and imposed a form of involuntary servitude; free speech rights were infringed by the bar; the integrated bar was like a "closed shop"; integration was motivated by economic self-interest and guildism; integration gave state power to a private interest group which advocated legal reform carrying broad social implications; the integrated bar was not responsive to captive members' desires and needs; excessive influence by specialized minority interests or a power clique would result from bar integration; compulsion would not cure attorney apathy; integration would cause rigidity in the profession; and even if the integrated bar was limited to lobbying activities related to the administration of justice, it was often impossible to distinguish administration of justice from broad public policy.[23]

The opponents of bar integration stressed the rights and autonomy of the attorney as an individual. The opponents, however, were in the minority and the proponents won the battle, although not necessarily the war. These arguments, both pro and con, provide an understanding of the early stages of the integration movement and its underlying rationales. They illustrate the first stage in the evolution of the integration debate, a stage marked by heated debate and commentary. Proponents sought an expansive integrated bar, while opponents rallied against the integrated bar in its entirety. This stage represents the

22. *Id.* at 37.
23. *Id.* at 39.

formation of the integration movement and the early adoption of the integrated bar by many states.

Although the anti-integrationists were against the whole notion of an integrated bar, their position became indefensible after the Supreme Court's decision in *Lathrop v. Donohue*.[24]

B. *Lathrop v. Donohue*

In *Lathrop v. Donohue*[25] the Supreme Court held that a state may require an attorney to become a member and pay reasonable annual dues to an integrated bar association in order to practice law within the state. This was the first case in which the Court dealt with the constitutional challenge to the integrated bar association. *Lathrop* was heralded as the end to the challenge of the integrated bar. However, it has been recognized that *Lathrop* did not decide whether an attorney can be forced to provide financial support for integrated bar activities with which she disagrees.[26]

Lathrop involved the freedom of association which is implicated through bar integration. Lathrop, a Wisconsin attorney, challenged the constitutionality of the Wisconsin integrated bar based on the first amendment freedoms of speech, press, and assembly that are applicable to the states through the fourteenth amendment.[27] Lathrop argued that there was a freedom not to associate that was violated when the Wisconsin Supreme Court ordered him and all other Wisconsin lawyers to pay annual dues of $15 in order to practice law.[28] Lathrop also opposed the activities that the bar association supported with the compulsory dues.

The Wisconsin Supreme Court, which had ordered integration of the bar,[29] concluded that integration did not violate Lathrop's right of association and that his rights to free speech were not violated because the state bar used his membership dues to support legislation with

24. 367 U.S. 820 (1961).
25. *Id.* For a more detailed discussion of *Lathrop* the reader should consult Comment, *The Integrated Bar After Lathrop v. Donohue — Integration or Disintegration*, 11 CATH. U.L. REV. 85 (1962).
26. *See* Lathrop v. Donohue, 367 U.S. 820, 847-48, where the Court stated "[w]e, therefore, intimate no view as to the correctness of the conclusion . . . that the appellant may constitutionally be compelled to contribute his financial support to political activities which he opposes." *See also* Sorenson, *supra* note 19.
27. Lathrop v. Donohue, 10 Wis. 2d 230, 102 N.W.2d 404 (1960).
28. *Id.* at 236-37, 102 N.W.2d at 407-08. *See also* Lathrop, 367 U.S. 820, where Mr. Lathrop attached to his complaint a copy of a letter which read, "I do not like to be coerced to support an organization which is authorized and directed to engage in political and propaganda activities . . . . A major portion of the activities of the State Bar as prescribed by the Supreme Court of Wisconsin are of a political and propaganda nature." *Id.* at 822.
29. The Wisconsin Supreme Court integrated the state bar by court order on January 1, 1957. *See* In re Integration of the Bar, 273 Wis. 281, 77 N.W.2d 602 (1956).

which he disagreed. Lathrop appealed the decision of the Wisconsin Supreme Court and the United States Supreme Court affirmed the decision.

Writing for a plurality, Justice Brennan concluded that Lathrop's argument was essentially one of freedom of association. "[A]ppellant's argument is that he cannot constitutionally be compelled to join and give support to an organization which has among its functions the expression of opinion on legislative matters and which utilizes its property, funds, and employees for the purposes of influencing legislation and public opinion toward legislation."[30] The plurality responded that Lathrop was not being forced to associate with anyone and that the only compulsion he was subjected to was the payment of the $15 annual dues.[31]

In the summary dismissal of Lathrop's freedom of association claim the Court dealt a major blow to the opponents of integration. The claim that the integrated bar was unconstitutional in its entirety became untenable.[32] Thus, the second stage of the integration debate began. Opponents now had to accept an integrated bar, although possibly one of limited functions. The *Lathrop* case also gave rise to the basis for the current development in the bar integration debate. *Lathrop* discussed, but did not decide, whether a bar association could compel dues for activities with which some of its members disagreed. Although not deciding the question, the opinion did provide certain policy considerations implicated by this question.

The Court stated that the only issue confronting it was the "compelled financial support of group activities, not with involuntary membership in any other respect."[33] In addressing Lathrop's claims the

30. Lathrop v. Donohue, 367 U.S. 820, 827 (1961).

31. *Id.* at 828. The Court followed the decision of the Wisconsin Supreme Court which held that the only compulsion exerted on Lathrop was the payment of $15 annual dues to the state bar. *See* Lathrop v. Donohue, 10 Wis. 2d 230, 237, 102 N.W.2d 404, 408 (1960).

32. However, one scholar writing on the Wisconsin integrated bar has suggested that the concept of an integrated bar may still be unconstitutional in its entirety. *See* T. SCHNEYER, THE INCOHERENCE OF THE UNIFIED BAR CONCEPT: GENERALIZING FROM THE WISCONSIN CASE (American Bar Foundation 1983). Noting that the Court did not decide whether compelled bar dues could be spent over a dissident member's objection, Schneyer argued that in light of this constitutional challenge and the existing infringements on associational rights, the Court if considering these challenges together may still find the integrated bar to be unconstitutional. *Id.* at 67.

33. Lathrop v. Donohue, 367 U.S. 820, 828 (1961). The Court also referred to two previous decisions which have addressed this issue although in the labor union context. *See* International Association of Machinists v. Street, 367 U.S. 740 (1961) (decided the same day as *Lathrop*); Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956). For a complete discussion of *Hanson* and *Street* and their relevance to *Lathrop* and the integrated bar the reader should consult SCHNEYER, *supra* note 32, at 25-40; Sorenson, *supra* note 19, at 40-45. The Court's decision in *Hanson*

Court relied on *Railway Employee's Department v. Hanson*,[34] where it held that the Railway Labor Act "did not on its face abridge protected rights of association in authorizing union-shop agreements between interstate railroads and unions of their employees conditioning the employees' continued employment on payment of union dues, initiation fees, and assessments."[35] In linking the integrated bar to the labor union agreements in *Hanson*, the Court would uphold the assessment of a reasonable fee by the integrated bar if it served a compelling state policy.

The Court examined the activities of the Wisconsin State Bar and found them to be related to a sufficient state interest in the regulation of the legal profession.

> Both in purpose and in practice the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the state, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy.[36]

The Court, therefore, upheld the integrated bar and the assessment of annual dues to support its activities. In addition the Court identified important governmental interests for which a state bar could compel financial support from its members.

The Court, however, did not decide whether using bar association dues to support political purposes would violate the Constitution. "We are persuaded that on this record we have no sound basis for deciding appellant's constitutional claim insofar as it rests on the assertion that his rights of free speech are violated by the use of his money for causes which he opposes."[37] The record did not provide any information as to the activities of the State Bar to which Lathrop objected and there-

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linked the fate of the integrated bar to that of the union shops. Justice Douglas, writing for a unanimous Court stated "[o]n the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." Railway Employee's Dep't v. Hanson, 351 U.S. 225, 238 (1956). However, Justice Douglas later remarked that "on reflection the analogy fails." Lathrop v. Donohue, 367 U.S. 820, 879 (1961) (Douglas, J., dissenting).

34. 351 U.S. 225 (1956).

35. Lathrop v. Donohue, 367 U.S. 820, 842 (1961). A union shop agreement requires that all affected employees must actually join the union, maintain their membership, and pay union dues, as a condition of their employment. An agency shop agreement is one under which affected employees are not required to actually become members of the union, but are required to pay "service fees" bearing a relationship to union dues to help defray the collective bargaining costs of the agent-union which acts as the exclusive bargaining agent of all affected employees, union members and non-members alike. *See generally* 48 AM. JUR. 2D *Labor and Labor Relations*, §§ 12-20, 355-56, 361 (1979).

36. Lathrop v. Donohue, 367 U.S. 820, 843 (1961).

37. *Id.* at 845.

fore the issue was not concretely presented for adjudication.[38]

The plurality of four justices found that the annual dues were not on their face unconstitutional relying on the analogy to *Hanson*, that the constitutional issues tendered were not ripe for adjudication. The other five members of the Court disagreed with the plurality and believed the constitutional issues should be adjudicated. Three justices, Justices Harlan, Frankfurter and Whittaker, would have upheld the constitutionality of using compulsory dues to finance the state bar activities even where those activities were opposed by dissident members.[39] The other two justices, Justices Black and Douglas, would have held such activities to be unconstitutional.[40]

The only proposition on which a majority of the Court in *Lathrop* agreed was that the constitutional issues should be reached. However, due to the disparate views of those five justices on the merits and the failure of the other four members of the Court to discuss the constitutional questions, *Lathrop* does not provide a clear holding to guide the adjudication of the constitutional issues presented in this article. A clear ruling on these constitutional issues did not come until the Court's ruling in *Abood v. Detroit Board of Education*.[41]

C. *Abood v. Detroit Board of Education*

The Court's decision in *Abood v. Detroit Board of Education*[42] marks the beginning of the third, and current, stage in the integration debate. *Abood* provided the anti-integrationists with the needed precedent to make a persuasive challenge to the compelled financial support of activities which are opposed by dissenting members of the bar.

In *Abood* the Court stated it was confronted with the constitutional issue not decided in *Hanson*, *Street* or *Lathrop* — the use of union-shop fees and bar association dues for political and ideological pur-

38. The language in *Lathrop* led some to believe that in order to challenge the activities of a bar association the dissident must, with much specificity, allege precisely those activities which he opposed. This view was later rejected by the Court in Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). *See infra* note 136, and accompanying text.

39. *See* Lathrop v. Donohue, 367 U.S. 820, 848 (1961) (Harlan, J., concurring in judgment and joined by Frankfurter, J.); *id.* at 877 (Douglas, J., dissenting).

40. *See id.* at 865 (Black, J., dissenting); *id.* at 877 (Douglas, J., dissenting).

41. 431 U.S. 209, *reh'g denied*, 433 U.S. 915 (1977).

42. 431 U.S. 209 (1977). For a general discussion of *Abood*, see Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. REV. 995 (1982); Mitchell, *Public Sector Union Security: The Impact of Abood*, 29 LAB. L.J. 697 (1978); Note, *Constitutional Limits on the Use of Contributions Compelled under Agency Shop Agreements*, 38 LA. L. REV. 850 (1978). *See* Petition of Chapman, 128 N.H. 24, 29, 509 A.2d 753, 757 (1986) ("At the outset, we note that the constitutionality of the integrated, or unified bar, is not at issue here .... [T]he success of such a challenge is made all the more unlikely by decisions of both the United States Supreme Court and this court . . . .").

poses unrelated to collective bargaining and proper bar association activities.[43]

Abood involved a Michigan statute which authorized an "agency shop" arrangement between unions and local government employers.[44] Under this arrangement every employee represented by a union, even though not a union member, must pay to the union, as a condition of employment, a service charge equal in amount to the union dues. A group of teachers filed actions against the Detroit Board of Education and the Teachers Union challenging the union-shop agreement. The objections of the teachers stemmed from allegations that the union engaged "in a number and variety of activities and programs which are economic, political, professional, scientific and religious in nature of which . . .[they]. . . do not approve."[45] The teachers sought a ruling by the Supreme Court that the agency-shop agreement violated the constitutional protections of, among others, the freedom of association protected by the first and fourteenth amendments.

The Court in *Abood*, as in *Lathrop*, relied heavily on its decisions in *Hanson* and *Street*. "Consideration of the question whether an agency-shop provision in a collective-bargaining agreement covering governmental employees is, as such, constitutionally valid must begin with two cases in this Court that on their face go far toward resolving the issue. The cases are *Railway Employees' Department v. Hanson*[46] and *Machinists v. Street*."[47] In *Hanson* the Court made it very clear that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate . . . the First Amendment."[48] However, in *Hanson*, the Court did not have to decide the issue presented in *Abood*. *Hanson* only expressed an opinion with reference to fees assessed for the purposes of collective bargaining; *Hanson* did not discuss the assessment of fees for purposes unrelated to collective bargaining.

Later in *Street*, the Court again faced the issue decided in *Hanson*. In *Street*, however, the record contained findings that the union treas-

43. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232-33 n.29 (1977).

44. *Id.* at 211. For a distinction between the "union shop" in *Hanson* and *Street* and the "agency shop" in *Abood*, see *supra* note 35.

45. *Id.* at 213.

46. 351 U.S. 225 (1956) (involving a group of railroad employees that brought an action in a Nebraska court to enjoin enforcement of a union-shop agreement). *See supra* note 33 and accompanying text. The record in *Hanson* contained no evidence that union dues were used to force ideological conformity. In *Hanson* the Court upheld the union-shop agreement and in addressing the first amendment challenge stated "[i]f 'assessments' are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented." *Id.* at 235 (footnote omitted).

47. 367 U.S. 740 (1961). *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 214 (1977), and *supra* note 33 and accompanying text.

48. Railway Employees' Dep't v. Hanson, 351 U.S. 225, 238 (1956).

ury to which all employees were required to contribute had been used to "finance the campaigns of candidates for federal and state offices whom [the plaintiffs] opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagree."[49] The Court construed the Railway Labor Act so as to avoid the constitutional issues although recognizing that the constitutional issues were "questions of the utmost gravity."[50] The Court held that the expenditure of funds for political purposes violated the Act itself and that compulsory dues could only be used for purposes germane to collective bargaining.[51]

In *Hanson*, *Street*, and *Abood* the Court was especially concerned with "free riders" in the collective bargaining context.[52] Free riders are those who "refuse to contribute to the union while obtaining benefits of union representation that necessarily accrues [sic] to all employees."[53] Although recognizing that compelling financial support of the union collective-bargaining activities may very well involve an impact on first amendment rights, the Court held that such "interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress."[54] This is significant because the free rider problem is one of the arguments that has been advanced for an integrated bar. The Court's concern with the free rider problem may also be one of the factors behind its decision in *Lathrop*, which upheld the assessment of a reasonable fee to the bar. This argument, however, is not persuasive when the activities that are opposed, and their financial support, do not promote any interest the government may have in regulating the legal profession. This issue was not decided in *Lathrop*.

Abood differed from *Hanson* and *Street*, however, and went beyond the free rider problem because Abood's complaint alleged, and the Michigan Court of Appeals ruled, that state law "sanctions the use of nonunion members' fees for purposes other than collective bargaining."[55] Therefore the Court was required to address the constitutional issues that were left open in *Hanson*, *Street*, and *Lathrop*.

The Court accepted Abood's argument that he may prevent the union from spending a part of his "required service fees to contribute to political candidates and to express political views unrelated to its

49. Machinists v. Street, 367 U.S. 740, 744 (1961).
50. *Id.* at 749.
51. Such activities included negotiating and administering the collective-bargaining agreement and adjusting grievances and disputes. *See* Machinists v. Street, 367 U.S. 740, 768 (1961).
52. This has been one of the reasons traditionally advanced to support bar integration. *See supra* note 20, and accompanying text.
53. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977).
54. *Id.*
55. Abood v. Detroit Bd. of Educ., 60 Mich. App. 92, 99, 230 N.W.2d 322, 326 (1975).

duties as exclusive bargaining representative."[56] In reaching this result the Court stated that the government cannot prevent a person from contributing to an organization for the purpose of spreading a political message and the fact that Abood is "compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement [on his] constitutional rights."[57]

In clarifying its decision the Court stated:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.[58]

The Court recognized its decision would create difficult problems in "drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective-bargaining, for which such compulsion is prohibited."[59]

This discussion of *Hanson*, *Street*, *Lathrop*, and *Abood* brings us up to date on the cases that have developed the integration debate and have shaped the current challenge. There have not been any post-*Abood* Supreme Court decisions which have addressed these cases in the context of a bar association. However, several state and federal courts have been grappling with this issue and have dealt with it in the post-*Abood* years. This article will now address these decisions and how the courts have dealt with this difficult constitutional issue.

III. CONTEMPORARY CHALLENGES TO THE INTEGRATED BAR

This portion of the article deals specifically with the propriety of using required fees paid to an integrated bar association for particular actions, such as lobbying or political activities, which are not approved of by some of the members of the association.[60] This current chal-

56. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977).
57. *Id.*
58. *Id.* at 235-36.
59. *Id.* at 236.
60. *See generally* Annotation, *Use of Compulsory Bar Association Dues or Fees for Activities From Which Particular Members Dissent*, 40 A.L.R.4TH 672 (1985). Some scholars have argued that if the integrated bar is limited to only those activities allowed under the principles of *Abood* then the integrated bar may cease to exist. *See, e.g.*, SCHNEYER, *supra* note 32, at 57-68; Sorenson, *supra* note 19, at 34. Although lobbying and political activities are the clearest examples of improper bar activities, I do not want to leave the impression that these are the only activities that may fail constitutional scrutiny. These are, however, the clearest examples because they involve elements of ideology and thus implicate negative first

lenge to the integrated bar is not new; similar challenges have been made for several years.[61] However, the recent Supreme Court precedents which have already been discussed have added credibility to the challenge and have renewed the debate.[62]

A. Recent Case Law

A handful of state and federal court decisions have specifically addressed this issue with varying results. It is hoped that in analyzing these recent cases an analytical framework will emerge which will provide: (1) a test to determine if bar dues can be compelled over objection; and (2) a method to determine which activities of the bar can legitimately be financed through compelled financial support of a dissenting bar member. The first decision of this type is *Arrow v. Dow*.[63]

In *Arrow* a group of New Mexico State Bar members brought an action challenging the use of mandatory bar dues to lobby for or against legislation in the New Mexico Legislature. The plaintiffs, dissident bar members, claimed deprivations of freedom of speech and association through the use of their bar dues for purposes which they opposed.[64] Plaintiffs sought restitution of their bar dues spent for those purposes and also injunctive relief.

Since 1977 portions of the New Mexico State Bar Association dues have been used to finance lobbyists which lobby for or against "issues which the Bar, by its president, finds to be germane to the purposes for which the Bar was formed."[65] The bar claimed that the use of the mandatory dues to support lobbyist activity did not violate any first amendment rights of the plaintiffs and, alternatively, any first amendment infringement was outweighted by the important governmental interests served by the bar and its activities.[66]

The district court relied on the leading Supreme Court cases of

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amendment rights when a position of the bar association is imputed to a dissenting member. Innocuous or politically neutral bar activities may violate the constitution, although the violation is not as great.

61. *See, e.g.*, Sams v. Olah, 225 Ga. 497, 169 S.E.2d 790 (1969), *cert. denied*, 397 U.S. 914 (1970).

62. The debate in Nebraska has become even more heated, in part, due to a poll of the state bar membership conducted in the Fall of 1986 by the author of this article. The results of this poll will be made available to those who request them from the Nebraska Law Review and pay a fee to meet reproduction costs.

63. 544 F. Supp. 458 (D. N.M. 1982). *See also* Arrow v. Dow, 554 F. Supp. 1086 (D. N.M. 1983).

64. Arrow v. Dow, 544 F. Supp. 458, 459 (D. N.M. 1982).

65. *Id.* It seems that the bar association president also read the *Abood* decision since he adopted the Court's language when referring to the bar's lobbying activities as "germane" to the purposes for which the bar was integrated, and that this has been the case since 1977, the year *Abood* was decided. *See* Abood v. Detroit Bd. of Educ., 431 U.S. at 209, 235-36 (1977).

66. Arrow v. Dow, 544 F. Supp. 458, 459-60 (D. N.M. 1982).

Hanson, *Street*, *Lathrop*, and *Abood*, discussed *supra*. The court recognized that *Hanson* and *Street* upheld compelled financial support of collective bargaining activities under union-shop agreements and that *Lathrop* allowed mandatory bar membership along with compelled financial support without any first amendment infringement. However the court also considered the Supreme Court's decision in *Abood* and found there to be no significant distinction between the question presented in *Abood* and the compelled financial support of bar association activities.[67]

After deciding that *Abood* controlled its decision the court was faced with only one remaining question. The court phrased the question in the following manner:

> Are society's interests in the State Legislature being informed of the views of the majority of lawyers on issues which may reasonably be expected to promote the administration of justice or improvement of the legal system important governmental interests which justify the infringement upon plaintiffs' rights occasioned by the use of Bar dues to finance lobbying efforts?[68]

The court concluded that the lobbying activities of the bar did not serve important governmental interests as contemplated in *Abood*. The bar unsuccessfully argued that the activities were related to the administration of justice and the improvement of the legal system. The court responded to this argument by stating that "[t]he standard urged by the Bar is an all-encompassing exception to the rule of *Abood* . . . . The standard is too broad."[69] The court further stated that it could not conclude that "advancing the administration of justice or improving the legal system are equivalent in the context of a Bar Association, to collective bargaining activities in the context of a labor union."[70]

This conclusion is also correct under the functional test which is proposed in the following section of this article. The lobbying activities of the bar were not strictly necessary to assure the proper functioning of the judicial process. Further, the lobbying activities could be financed by less restrictive means such as voluntary contributions or through voluntary bar associations without any first amendment infringement. The bar speaking as a unified group with one voice is not a sufficiently compelling reason under a functional test to justify any first amendment infringements.[71]

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67. *Id.* at 461. Indeed the Supreme Court in *Abood* recognized that it was confronted with the issue left unanswered in *Lathrop*. *See* Abood v. Detriot Bd. of Educ., 431 U.S. 209 (1977). *See also supra* note 36 and accompanying text.

68. Arrow v. Dow, 544 F. Supp. 458, 462 (D. N.M. 1982).

69. *Id.* at 462.

70. *Id.*

71. Thus, even the taking of a position by a bar association without actually appropriating money to advocate the position may violate the Constitution. The bar associations seem to miss the point of a dissenting member's objections. It is

The court did not, however, provide any sort of test or analysis to flesh out those activities for which the bar may compel financial support from those that it cannot.

> I conclude that the Bar may exact dues to support only those duties and functions of the bar which serve important or compelling governmental interests. I do not attempt to delineate all functions and duties of the Bar which do serve important governmental interests, I do conclude that lobbying efforts at issue in this case did not serve such important governmental interests.[72]

Although not proposing a test the court did cite approvingly to the language in *Lathrop* which suggested that those activities which would justify first amendment infringement were those that were "improving the ethical and educational standards of lawyers *without reference to the political process.*"[73]

The *Arrow* decision was one of the first cases to address this question framed in a manner similar to *Abood.* Several other courts have also followed *Arrow's* reliance on *Abood,* with varying conclusions.

There are two Michigan Supreme Court decisions which are the result of a dissident bar member, Falk, objecting to the manner in which his compulsory dues were spent.[74] In both decisions the court was split and several opinions were filed, nevertheless the opinions which were filed in *Falk I,* and later in *Falk II,* provide useful analysis and will be discussed in great detail. The opinions in the *Falk* tandem represent differing methods of analyzing the constitutional issue presented by compelled financial support of a bar association's activities.

The issue presented in *Falk I*[75] was identical to the issue presented in *Arrow.* Mr. Falk brought an action challenging the compelled financial support of bar activities which he felt were unconstitutionally violating his first amendment rights.[76] Although the court ordered further evidentiary hearings to develop the record with regard to cer-

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generally not only the fact that $7.58 out of the $150.00 regular dues assessment will be used for lobbying that offends dissenters; it is this plus the fact that the bar's official positions will be imputed to the dissenters. *See* REPORT OF SPECIAL COMMITTEE ON NSBA POLICY ON LEGISLATION at 7 (Sept 14, 1987) [hereinafter SENNETT COMMITTEE REPORT]. Thus, even a dues check-off does not cure the underlying constitutional infringement. As long as the bar takes an official position, an argument can be made that there is a constitutional violation. Given this observation, the best course of action to remedy a dissenter's constitutional deprivations would be to prohibit a bar association from taking official positions on such matters.

72. Arrow v. Dow, 544 F. Supp. 458, 463 (D. N.M. 1982).
73. *Id.* at 462 (quoting Lathrop v. Donohue, 367 U.S. 820, 843 (1960)) (emphasis supplied). *See also* Petition of Chapman, 128 N.H. 24, 30, 509 A.2d 753, 762 (1986).
74. Falk v. State Bar of Mich., 411 Mich. 63, 305 N.W.2d 201 (1981) [hereinafter *Falk I*], *petition dismissed,* 418 Mich. 270, 342 N.W.2d 504 (1983) [hereinafter *Falk II*], *cert. denied,* 469 U.S. 925 (1984).
75. 411 Mich. 63, 305 N.W.2d 201 (1981).
76. The State Bar of Michigan was integrated through legislation. *See* 1935 Mich.

tain bar activities, the court did address the legal principles involved in the case.

There was no majority opinion of the court for a decision and therefore the matter was remanded. However, three opinions were filed by the court. The first two opinions will now be discussed. The third opinion by Justice Levin and joined by Justice Kavanagh discusses the problem but provides little guidance and hence will not be discussed in this article.[77]

The first opinion, authored by Justice Ryan and joined by Justices Moody and Fitzgerald, began by stating:

> The State of Michigan, through the combined actions of the Supreme Court, the Legislature, and the State Bar, may compulsorily exact dues, and require association, *to support only those duties and functions of the State Bar which serve a compelling state interest and which cannot be accomplished by means less intrusive upon First Amendment rights of the objecting individuals affected.*[78]

By using such key phrases as "compelling state interest" and "less intrusive means," Justice Ryan made it clear from the outset what type of test he would employ.

Justice Ryan, as did the court in *Arrow*, looked to the Supreme Court decisions in *Hanson*, *Street*, *Lathrop*, and *Abood* to guide his decision. After a rather detailed discussion of the holdings in *Hanson*, *Street*, and *Lathrop*, Justice Ryan recognized that although not decided on first amendment grounds these cases provided useful, albeit limited, guidance.

Justice Ryan also carefully considered the principles enunciated in *Abood*, while recognizing that the guidance provided by *Abood* was limited. "While the decision in *Abood* is of primary significance to the instant case, it does not offer a clear statement of the controlling framework for analysis of First Amendment issues of the kind here presented."[79]

Pub. Acts 58; MICH. COMP. LAWS § 600.901 (1966); MICH. STAT. ANN. § 27A.901 (Callaghan 1966).

77. Justice Levin's opinion, joined by Justice Kavanagh, agreed that at some point the interests of the bar and the state must yield to the constitutional freedoms of the individual lawyer. However, he would not have defined that point on the record before the court. "We emphasize that the Court is not now deciding, nor intimating an opinion on, either the appropriate standard of judicial scrutiny or a definition of the state interests served by the bar." *Falk I*, 411 Mich. 63, 177, 305 N.W. 2d 201, 247 (1981).

78. *Falk I*, 411 Mich. 63, 84, 305 N.W.2d 201, 202 (1981) (emphasis supplied). Because of some inadequacies in the pleadings Justice Ryan's opinion, as well as the other two opinions filed in the case, interpreted Falk's petition as a "complaint for a writ of superintending control over the State Bar of Michigan." *Id.* at 86, 305 N.W.2d at 203. For a very recent case which follows a similar analysis see Gibson v. The Fla. Bar, 798 F.2d 1564, 1569 (11th Cir. 1986); *but see* The Fla. Bar, 439 So. 2d 213 (Fla. 1983).

79. *Falk I*, 411 Mich. 63, 106, 305 N.W.2d 201, 213 (1981).

Therefore, relying on the Supreme Court decision of *Elrod v. Burns*[80] the court addressed the controlling principles. *Elrod* involved a constitutional challenge to a patronage system in a county sheriff's department which required employees to become affiliated with or sponsored by the political party in control of the sheriff's office, or face possible discharge. Justice Brennan's opinion in the plurality decision stated that such a practice violated the first amendment even though a governmental benefit is not a right and can be denied for various reasons. Justice Brennan maintained that there are some reasons upon which a governmental benefit cannot be denied.[81] He then noted that a first amendment infringement must be analyzed under a strict scrutiny test, rejecting a rational basis test, and that the governmental action must be closely drawn so as not to unduly infringe upon first amendment rights.

Accepting these well settled principles Justice Ryan sought to analyze the activities of the bar association to which Falk objected. Recognizing that the state has a strong interest in regulating attorneys, and potentially a compelling interest, the infringement of constitutional rights must nevertheless be "consciously and scrupulously minimized."[82]

> We therefore conclude . . . the State Bar, may compulsorily exact dues, and require association, to support only those duties and functions of the State Bar which serve compelling state interests and which cannot be accomplished by means less intrusive upon the First Amendment rights of objecting individual attorneys.[83]

In the "Findings, Conclusions, and Relief" Justice Ryan stated:

> [T]he regulation of the practice of law, the maintenance of high standards in the legal profession, and the discharge of the profession's duty to protect and inform the public are, in the context of the present challenge, purposes in which the State of Michigan has a compelling interest which will justify unavoidable intrusions on the First Amendment rights of objecting attorneys.[84]

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80. 427 U.S. 347 (1976).

81. *Falk I*, 411 Mich. 63, 106-07, 305 N.W.2d 201, 213 (1981) (citing Elrod v. Burns, 427 U.S. 347, 360-63 (1976)) *See also* Sherbert v. Verner, 374 U.S. 398 (1963). The Court rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.' *Id.* at 404.

82. *Falk I*, 411 Mich. 63, 112, 305 N.W.2d 201, 216 (1981).

83. *Id.*

84. *Id.* at 114, 305 N.W.2d at 217. The court proceeded to list those activities which serve a compelling interest and cannot be accomplished by means less intrusive to first amendment rights. That list included: all regulatory and licensing activities, continuing legal education activities, publication of the Michigan Bar Journal, maintenance of a client security fund, community legal education projects, and lawyer referral services. *Id.* at 114-16, 305 N.W.2d at 217. Those activities that failed to promote a compelling interest were: rendering technical advice to the legislature, testifying before state bodies, taking and promoting positions on legislation, retaining a lobbyist, activities designed to further the commercial and economic interests of members, and the Lawyer Placement Service. *Id.* at 116-19, 305 N.W.2d at 217-19.

Therefore the opinion followed an analysis similar to that in *Arrow*. However, the opinion merely stated conclusions, providing no analysis or reasoning which might be useful in future cases.

In the second opinion Justice Williams, joined by Chief Justice Coleman, opined that Falk was not entitled to relief. Justice Williams would have held the activities of the state bar served a compelling interest with the exception of the use of the State Bar mailing list for commercial solicitations, which violated the right to privacy. While agreeing first amendment rights are not absolute, it was conceded that the state must have a compelling state interest in order to justify any infringement. However, a new test was proposed to review the means employed to promote the governmental state interest. Rejecting the least restrictive means test, *Abood* was read to apply a less stringent test, referred to as the "germane" test.[85] Such a test would be applied in cases where the first amendment infringement is indirect as opposed to direct. The opinion continued: "Therefore we believe that the appropriate test to analyze petitioner's constitutional challenges is whether the state has a compelling interest involved, and if so, whether the Bar's complained-of activities are *germane* to that interest."[86] The opinion found the state to have a compelling interest in regulating the profession and then proceeded to determine if the activities complained of were germane to this interest.

Justice Williams identified the state's compelling interest as advancing the science of jurisprudence and the efficient administration of justice, and without elaboration, held that ten of the eleven acts objected to were germane to this compelling interest.[87] The summary treatment of the objectionable activities indicates that Justice Williams has a very broad concept of the "administration of justice and advancement of jurisprudence." Under such a broad standard almost any activity of the bar could be considered germane to the state's interest, including, for example, a lawyer placement service, a lawyer's wives organization, and bar social functions. Recognizing that such activities are not, in and of themselves, compelling interests, Justice Williams nevertheless determined they were germane to the overriding governmental interest which was compelling.[88] The only challenged activity of the bar which the opinion found to violate the dissident bar member's rights was the selling of the bar membership mailing list for commercial purposes by the bar.[89] The opinion held this activity vio-

85. *Id.* at 137-38, 305 N.W.2d at 226-27.

86. *Id.* at 138, 305 N.W.2d at 227-228 (emphasis supplied).

87. *Id.* at 142-61, 305 N.W.2d 230-38. *See* Petition of Chapman, 128 N.H. 24, 43, 509 A.2d 753, 766 (1986) (Justice Batchelder, dissenting) (a similarly expansive reading of "administration of justice").

88. *Falk I*, 411 Mich. 63, 159-60, 305 N.W.2d 201, 237-38 (1981).

89. *Id.* at 161-64, 305 N.W.2d at 239-40.

lated the right to privacy.

Although the two opinions just discussed would have reached differing results, they nevertheless have a great deal of similarities. The analysis employed in both opinions followed a traditional constitutional analysis relying on established principles. The only noticeable dissimilarity was the rejection of the least restrictive means component of the traditional strict scrutiny analysis and the use of the "germane test" in the opinion authored by Justice Williams, a departure which was also based on language in *Abood*.

After remand Falk's case again reached the Supreme Court of Michigan and again three opinions were filled.[90] In a *per curiam* order of the court Falk was denied relief, however, the court stated that:

> This proceeding has convinced us all . . . that certain practices of the State Bar may warrant closer scrutiny pursuant to our duty to superintend its activities. We will in the near future, therefore, by separate administrative order appoint a committee to review those practices and activities and make recommendations to the Court.[91]

The first opinion, authored by Justice Boyle and joined by Chief Justice Williams, will be discussed below, the second opinion, authored by Justice Kavanagh and joined by Justice Levin, declined to express an opinion on the constitutional issues presented and therefore will not be discussed in this article. The third opinion, filed by Justice Ryan and joined by Justices Cavanagh and Brickley, reaffirmed the position taken in the original decision; the bar association could only compel financial support for activities which promote a compelling state interest and which cannot be accomplished by less restrictive means.

The Boyle opinion stated that the test which should be applied to decide the issue was not a strict scrutiny test: "it is clear that the Supreme Court *does not* consider the strict scrutiny applied in other First Amendment cases to be appropriate in cases involving negative First Amendment rights."[92] Instead a two step test was proposed. The first step determined whether or not the asserted claim implicates the first amendment; before conduct can be a first amendment infringement it must first concern "expression." The second part of the test considers the connection between the individual and the compelled

90. *Falk II*, 418 Mich. 270, 342 N.W.2d 504 (1983).

91. *Id.* at 277, 342 N.W.2d at 504. *See also* Report of the Committee to Review the State Bar, 112 Wis.2d, 334 N.W.2d 544 (1983).

92. *Falk II*, 418 Mich. 270, 287, 342 N.W.2d 504, 509 (1983) (emphasis in original). *See* Gaebler, *supra* note 42 for a discussion of the negative first amendment rights. *See also* Petition of Chapman, 128 N.H. 24, 29, 509 A.2d 753, 757 (1986) (citations omitted) ("The federal right that he asserts is part of that category known as 'negative first amendment rights,' which may be defined as the right to be free from government action [compelling one] to associate and . . . to participate in certain forms of expression").

expression; if the relationship is attenuated then the government need not advance a substantial justification for the infringement.[93] However, the more direct the connection between the individual and the compelled expression, the more important the governmental interest must be.

> 'In other words, negative First Amendment cases require a sliding scale approach to balancing. The more serious the infringement of individual interests, the more vital the asserted advancement of government interests must be to outweigh the infringement and vice versa. The question in each case must be whether the compelled participation in expression infringes unduly upon individual interests.'[94]

Applying this test to the non-political activities of the bar it was determined that Falk failed to establish his burden of showing a first amendment infringement.[95] However, with regard to political activities of the bar it was determined that Falk carried the burden of establishing a first amendment infringement. The asserted first amendment interest was the compelled participation in expression by the bar, thus invading Falk's "freedom of conscience and intellect."[96] Nevertheless, the first amendment infringement was not considered to be closely connected to Falk because it involved only indirect financial contributions. The final step in the analysis, then, was the interest which the government must show to justify the infringement and whether it outweighs the infringement. Because the connection between the infringement and Falk was considered remote and the state had a substantial interest in the political activities of the bar, the court found no constitutional infirmities.[97]

B. Analysis of Recent Case Law

The *Arrow* court applied a traditional first amendment test, concluding that the state interest in the lobbying activities of the bar was not a compelling state interest as contemplated by the *Abood* case. The *Arrow* opinion recognized that the activities which would represent a compelling state interest were "improving the ethical and educational standards without reference to the political process."[98] Although applying a strict scrutiny test and identifying certain interests that the state has in the legal profession which would be compelling, the court did not propose a methodolgy for determining which activities were appropriate and which were not. The court's holding in this sense was very narrow; only that legislative lobbying activities were not compel-

93. *Falk II*, 418 Mich 270, 288-89, 342 N.W.2d 504, 510-11 (1983).
94. *Id.* at 292, 342 N.W.2d at 511 (quoting Gaebler, *supra* note 42, at 1016).
95. *Id.* at 295, 342 N.W.2d at 513.
96. *Id.* at 296, 342 N.W.2d at 513.
97. *Id.* at 299, 342 N.W.2d at 514.
98. Arrow v. Dow, 544 F. Supp. 458, 462 (D. N.M. 1982) (quoting Lathrop v. Donohue, 367 U.S. 820, 843 (1961)).

ling state interests. Indeed, the court stated, "I do not attempt to delineate all functions and duties of the Bar which do serve important governmental interests . . . "[99] The *Falk* case provides more guidance in dealing with this problem.

In Justice Ryan's opinion in *Falk I*, an approach similar to *Arrow* was followed. Justice Ryan also followed a strict scrutiny test, holding that first amendment infringements are justifiable only if a compelling state interest is furthered, and even then, only if the means used are the least restrictive to the first amendment rights. The Ryan opinion stated "the regulation of the practice of law, the maintenance of high standards in the legal profession, and the discharge of the profession's duty to protect and inform the public, are in the context of the present challenge, purposes for which the [state has a compelling interest]."[100]

Justice Ryan then concluded that several activities of the bar did not further compelling state interests and that alternatives were available which would not violate first amendment freedoms. The opinion, as did *Arrow*, failed to supplement its conclusions with an analysis of how impermissible activities could be distinguished from permissible activities. In *Falk II*, Justice Ryan's opinion, again, failed to elaborate on how the determination of which activities were compelling governmental interests and which were not was to be made.

The opposing view was expressed by Justice Williams, in *Falk I*, and Justice Boyle, in *Falk II*. Justice Williams' opinion agreed that first amendment rights are not absolute, however Justice Williams argued that first amendment rights give way to state activities that are merely germane to a compelling state interest. Justice Williams' opinion departed from Justice Ryan's and the *Arrow* decision when he argued that the means used to further the state's compelling interest need only be germane to that interest. This approach would not require the means to be the least restrictive alternative.

Justice Williams has drawn a distinction between direct and indirect first amendment infringements, holding that direct infringements require the least restrictive alternative whereas indirect infringements only require a showing that the activity is "germane" to the state's interests.[101] The opinion read *Abood* as proposing a new test for first amendment rights that are indirectly implicated.[102] Under this relaxed standard the opinion concluded that, with the exception of the selling of the bar membership mailing list, none of the activities of the bar objected to by Falk violated his first amendment freedoms.

A third test, or rather a refined version of Justice Williams' analy-

99. *Id.* at 463.
100. *Falk I*, 411 Mich. 63, 114, 305 N.W.2d 201, 217 (1981).
101. *Id.* at 135-38, 305 N.W.2d at 226-28 (citing *Lathrop* and *Abood*).
102. *See also* Gaebler, *supra* note 42.

sis, was proposed in Justice Boyle's opinion in *Falk II*. Justice Boyle's opinion refers to the rights infringed as rights of "non-association" and "non-expression."[103] Under Justice Boyle's reading of Supreme Court precedent these rights, referred to as negative first amendment rights, do not implicate a strict scrutiny analysis.[104] "Because such analysis [traditional strict scrutiny] is conspicuous by its absence from negative First Amendment cases, we are unable to conclude that the Supreme Court would apply it to resolve the case at bar."[105] Justice Boyle advocated a balancing test in which "the severity of the injury to the individual interest [is balanced] against the magnitude of the government interest sought to be served by the requirement or regulation."[106]

Under this test the first inquiry is whether the asserted claim implicates the first amendment, because only conduct characterized as expression can be the subject of the first amendment protections. The connection between the individual and the expression is then weighed against the state's interest in compelling the expression. The more direct the connection the stronger the state interest that is needed to compel the expression. Conversely, the more attenuated the connection the requirement of a substantial state interest is lessened.

Justice Boyle stated that the Court, in *Abood*, did not carefully weigh the governmental interest because arguably "this can be explained as an implicit finding that the infringement of individual interests was not severe."[107] However with respect to the financial support of political and ideological purposes, it was explained, the governmental interest in *Abood* was not strong in this aspect of the compelled contribution.

Under this analysis Justice Boyle would have held that the state's

103. These rights have been referred to as "negative" first amendment rights. *See* Gaebler, *supra* note 42, at 996.

104. Justice Boyle relied heavily on the Supreme Court decisions in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (school board required all students and teachers to salute the flag and recite the pledge of allegiance in the classroom); Wooley v. Maynard, 430 U.S. 705 (1977)(Jehovah's Witnesses objected to the display of the New Hampshire motto "Live Free or Die" on the license plate of their automobile); *Abood*, and Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980)(right of citizens to peacefully distribute political material in a privately owned shopping center).

105. *Falk II*, 418 Mich. 270, 288, 342 N.W.2d 504, 509 (1983).

106. *Id.* A similar analysis was advocated in Keller v. State Bar of California, 190 Cal. App. 3d 1196, 226 Cal. Rptr. 448 (1986). In *Keller* the court balanced the additional interference on first amendment rights resulting from compelled financial support of activities with which one disagrees against the asserted governmental interest, stating "some activities which would not be permissible standing alone may nonetheless be allowed because they do not increase the infringement already resulting from compelled, but justified extraction." *Id.* at —, 226 Cal. Rptr. at 467.

107. *Falk II*, 418 Mich. 270, 290, 342 N.W.2d 504, 510 (1983).

interest outweighed the dissident bar member's negative first amendment rights with respect to political as well as non-political activities.

Therefore three tests have been proposed to deal with the problem presented by compelled financial support of a bar association's activities over the objection of dissident members. First the *Arrow*-Ryan approach, second, the Williams approach, and finally, the Boyle approach.

I will treat the analysis proposed by Justices Williams and Boyle as formulations of the same test. This treatment is based on the fact that Justice Williams concurred in the opinion filed by Justice Boyle in *Falk II*, and because the analyses of the Justices are strikingly similar. Justice Williams, in *Falk I*, made an "indirect-direct" distinction in analyzing differing levels of first amendment infringements; similarly in *Falk II*, Justice Boyle referred to a "negative-affirmative" distinction in his analysis of differing levels of first amendment rights. I believe these distinctions in both decisions are formulations of the same analysis and therefore they will be treated as such.

The analysis of Justice Boyle places misguided reliance on Professor Gaebler's interpretation of the Supreme Court's decisions dealing with negative first amendment rights.[108] Professor Gaebler's analysis, as he himself admits, only addressed those rare cases where the first amendment infringement is a negative infringement (i.e., freedoms of non-speech and non-association) and where the infringement is slight. This analysis and balancing of first amendment infringements with the state's interest is not appropriate where, as in the case of compelled bar membership and financial support, other fundamental, *affirmative* first amendment rights are implicated (i.e., freedoms of speech and association).

Gaebler, in an effort to explain the Court's decision in *Elrod*,[109] which appeared to be a negative first amendment case, discussed this point. Failure to explain *Elrod* would have weakened Gaebler's analysis considerably. "There are other cases, however, which superficially appear to protect a right to refrain from speech or association, but which do so in circumstances where such protection is necessary to protect the more traditional first amendment rights to speak or associate freely."[110]

Gaebler, further explained that although their were negative first amendment rights implicated, the Court was more concerned with the affirmative first amendment infringements which also were implicated in *Elrod.*

108. Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Wooley v. Maynard, 430 U.S. 705 (1977); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

109. Elrod v. Burns, 427 U.S. 347 (1976) *see supra* note 80 and accompanying text.

110. Gaebler, *supra* note 42, at 996 (citing *Elrod*).

> However, *Elrod* does not depend on such protection [negative first amendment] to support its result. In fact the decision can easily be justified on more traditional first amendment grounds. As the Court noted, one of the restraints on freedom of association was that an employee could maintain affiliation, or work for the out-party only at the risk of losing his job.[111]

The case of compelled bar membership and financial support is more closely analogized to *Elrod* than the negative first amendment cases discussed by Gaebler. The integrated bar implicates negative, as well as affirmative, first amendment infringements and therefore the analysis in *Elrod* is the correct analysis. The integrated bar implicates the negative first amendment rights of non-association, non-speech and freedom of conscience. In addition the affirmative rights of speech and association are implicated through bar integration. The enhanced review of strict scrutiny in *Elrod* was the result of the Court's concern for the affirmative rights which were implicated in that case. This enhanced review is, similarly, necessary in the context of the present challenge in order to prevent further first amendment infringements of the affirmative rights violated through the integration of a state bar. The acknowledged infringements on these affirmative rights are exacerbated by the concomitant infringement of the negative rights also implicated in compulsory financial support.[112] By alleviating the infringement on the negative rights, this will in turn make the infringements of the affirmative rights more palatable.

Finally, the compelled financial support of the integrated bar is a pre-condition to the practice of law. This again resembles *Elrod*, which required political support as a pre-condition to county employment. This fact also leads to the conclusion that the integrated bar implicates greater first amendment infringements than even *Abood*. Justice Ryan, in *Falk I*, carefully explained the first amendment infringements in *Abood* and the greater infringements implicated by an integrated bar.

> [W]e are here concerned with the propriety of state-compelled association in, and financial support of, a public body corporate' as a condition precedent to the pursuit of one's livelihood as an attorney in this state, in any active legal capacity. No alternatives, even unpalatable ones, exist for the objecting individual attorney.[113]

This also supports the conclusion that the Gaebler analysis is faulty in the context of the current challenge to the integrated bar. Gaebler builds his analysis around *Abood* and therefore the analysis is not appropriate if the rights implicated are greater, or the infringements are more severe, than those implicated in *Abood*.

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111. *Id.*

112. The Court in *Lathrop* explicitly recognized that integration implicated the affirmative rights of speech and association. *See* Lathrop v. Donohue, 367 U.S. 820, 867 (1961).

113. *Falk I*, 411 Mich. 63, 110-11, 305 N.W.2d 201, 215 (1981).

Therefore, I submit the appropriate analysis was established in *Elrod* and advocated by Justice Ryan. I will now discuss this analysis and its application to the compelled financial support of an integrated bar.

IV. A PROPOSED ANALYTICAL FRAMEWORK

Although *Arrow* and a few other cases have held that bar associations may not use mandatory dues to support political and ideological activities with which dissenting members disagree,[114] these cases have failed to provide a framework to analyze and distinguish appropriate activities from inappropriate activities. In *Arrow* the court made it very clear that its decision was limited to legislative lobbying efforts by the bar and did not express an opinion on the other bar activities. Similarly, other opinions which have followed a strict scrutiny test have failed to provide a methodology to follow when making this determination. This portion of the article will provide a framework for analysis to determine for which activities the bar can finance through compelled financial support from dissident members.

In this article several of the traditional arguments for and against bar integration were listed.[115] Some of the very reasons which have been advanced in favor of bar integration have again entered the debate because dissident bar members do not feel such activities are appropriate functions of the bar associations. Therefore, although the

114. *See, e.g.*, Gibson v. The Fla. Bar, 798 F.2d 1564 (11th Cir. 1986); Scheneider v. Colegio De Abogados De Puerto Rico, 565 F. Supp. 963 (D. P.R. 1983) (held statutes compelling financial support of an integrated bar violated the first amendment), *vacated and remanded sub nom*, Romany v. Colegio De Abogados De Puerto Rico, 742 F.2d 32 (1st Cir. 1984) (district court should have abstained to allow the Puerto Rico Supreme Court a reasonable time to provide a remedy); Keller v. State Bar of California, 190 Cal. App. 3d 1196, 226 Cal. Rptr. 448 (1986); Reynolds v. State Bar of Mont., 660 P.2d 581 (Mont. 1983) (Montana Supreme Court held that State Bar may not use funds derived from compulsory dues for lobbying purposes unless it makes provision for refund to members dissenting from such lobbying); Report of Committee to Review the State Bar, 112 Wis.2d XIX, 334 N.W.2d 544 (1983) (state supreme court held that certain activities of the state bar were impermissible and that a rebate system would be instituted to refund dues of objecting members); *cf.* Galda v. Rutgers, 772 F.2d 1060 (3rd Cir. 1985), *cert. denied*, 106 S. Ct. 1375 (1986) (state university's exaction from students of fee to support student-run public interest research group that advances positions on political and ideological issues infringes first amendment rights of students who oppose organizations aims); *but see* The Fla. Bar, 439 So. 2d 213 (Fla. 1983) (state supreme court denied petition to amend Integration Rule which would limit the manner in which dues are spent). For additional commentary on this subject see Cantor, *Forced Payments to Service Institutions and Constitutional Interests In Ideological Non-Association*, 36 RUTGERS L. REV. 3 (1983); Gaebler, *supra* note 42; Note, *"Free Speech": First Amendment Limitations on Student Fee Expenditures*, 20 CAL. W. L. REV. 279 (1984).

115. *See supra* notes 21-23, and accompanying text.

debate has evolved from the outright rejection of an integrated bar to the acceptance of a bar of limited functions, the challenge remains the same and the question which remains unanswered is: "What are the appropriate duties and functions of an integrated bar?" In the last seventy-five years the issue has not changed and the debate has now come full circle. The integration debate must again address this difficult question.[116]

Guidance in addressing this question can be found in the early literature during the integration movement.[117] Much of this early literature attempted to delineate the bounds of the judiciary's inherent power over the legal profession[118] and the appropriate role of an integrated bar.[119]

This portion of the article will discuss a three step analysis; first, an explanation of the traditional constitutional test and its requirements; second, a framework for identifying which state interests served by an integrated bar rise to the level of compelling state interests;[120] and

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116. The Sennett Report acknowledged this problem:

> Another problem that faces integrated bar associations is the dilemma of attempting to confine the bar's legislative activities to the 'purposes' of the bar association. This is the question of the 'germaneness' of the proposed legislation, an area that our body has struggled with over the years. It is a line-drawing exercise that some persons, including some judges, have characterized as an exercise in futility.

SENNETT COMMITTEE REPORT, *supra* note 71 at 6.

117. *See, e.g.*, Curtis, *The Pros and Cons of an Integrated Bar*, 12 LAW SOC. J. 103-06 (1946); Essery, *Bar Integration*, 19 J. AM JUD. SOC. 174-78 (1936); Garrison, *Experience of Other States with Incorporated Bars*, 23 WIS. BAR ASSN. REPORTS 40-51 (1933).

118. *See, e.g.*, Kalish, *supra* note 3; Shanfield, *The Scope of Judicial Independence of the Legislature in Matters of Procedure and Control of the Bar*, XIX St. LOUIS L. REV. 163 (1934).

119. *See, e.g.*, Beardsley, *The Incorporated Bar*, 3 MO. BAR J. 67 (1932); Essery, *supra* note 117.

120. The appropriate duties and functions of the integrated bar may vary depending on the manner in which the bar was integrated. To illustrate, a bar integrated through court rule derives its authority through delegation from the state supreme court. *See, e.g.*, Kalish, *supra* note 3. "Since the court has ultimate authority over the Nebraska State Bar Association, this paper will not focus on the internal operations and procedures of the bar association . . . . The association derives all its power and authority from the court." *Id.* at 586 n.116. Therefore the state supreme court may only delegate that power which it possesses in its inherent power over the judiciary. In order to determine what power the integrated bar has, then, it may be necessary to first determine what powers the state supreme court has in its inherent authority over the judiciary. It then follows that the appropriate duties and functions of a bar integrated in such a manner may be limited, in the extreme, to only those powers enjoyed by the judiciary.

However, in a state which has been integrated through both legislative enactment and supreme court rule, the separation of powers concerns discussed above are not a limiting factor on the bar's activities. Nevertheless, the state legislature may delineate those activities which are to be carried on by the bar and also oversee those activities. See supra note 1, which discusses how the California legisla-

finally, a discussion of the least restrictive means component of the constitutional test.

A. Compelling State Interest Test

Under a traditional first amendment test any governmental infringement of a fundamental right must be justified by a compelling state interest and, further, the means used to meet the governmental end must be the least restrictive on first amendment rights.[121] This test is similar to Justice Ryan's opinions in *Falk I* and *II*. Therefore the first step is to identify the first amendment rights implicated by compelled financial support of the bar. The rights infringed upon through bar integration are freedoms of association, speech and belief.[122] The rights infringed upon through compelled financial support of the bar are the freedoms of non-expression, non-association, and freedom of conscience.[123]

The second step in this analysis is to determine if the state has a compelling interest which will justify the infringement of first amendment rights. There is one proposition on which all will agree; the state has a compelling interest in the regulation of the legal profession. The *Arrow* decision and all six opinions in the *Falk* cases agree on this point.

Lathrop has further established that the government does have a compelling interest which is furthered through bar integration, however the inquiry is not complete. The compelling interest served by the integrated bar must be identified and only those activities which further the state's compelling interest may be supported by the dues of dissident bar members.[124] *Lathrop* and the more recent cases that

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ture has maintained close review over the state bar. When the state legislature attempts to exert its perceived power over this area some state supreme courts may respond believing that the control of the judiciary and the legal profession fall under the court's inherent power over the judiciary. For example, one state legislature has passed a statute integrating the state bar while the judiciary has held the statute unconstitutional as a violation of the separation of powers, and then proceeded to integrate the state bar by court rule, thus asserting dominion over this area. *Cf. In re* Integration of Nebraska State Bar Ass'n., 133 Neb. 283, 275 N.W. 265 (1937) (the Nebraska Supreme Court integrated the state bar in the face of several failed legislative efforts to integrate the bar through statute); State *ex rel* Ralston v. Turner, 141 Neb. 556, 4 N.W.2d 302 (1942) (where the Nebraska Supreme Court held that a statute which provided standards for bar admissions infringed upon the court's inherent authority thus holding the statute unconstitutional).

121. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 703 (1978); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 958-73 (2d ed. 1983).

122. *See* Lathrop v. Donohue, 367 U.S. 820 (1961); *Falk I*, 411 Mich. 63, 111, 305 N.W.2d 201, 215 (1981); SCHNEYER, *supra* note 32, at 57-68.

123. *See Falk II*, 418 Mich. 270, 296, 342 N.W.2d 504, 513 (1983); Gaebler, *supra* note 42, at 1003-06.

124. One may think that looking to the legislation or court rule establishing the inte-

have dealt with this issue have failed to delineate those activities of the integrated bars that encompass compelling state interests and those activities that do not.

1. *Identifying Compelling Governmental Interests served by the Integrated Bar — A Functional Test.*

The analytic thesis of this portion of the article is that the appropriate way to frame the issue is a functional approach. This article proposes a method of analysis which may be useful in identifying the state interests which rise to the level of compelling governmental interests.

This analysis is a functional test.[125] This test is one of strict necessity and attempts to identify those activities of the bar that are necessary to assure the proper functioning of the judicial process. Only those activities necessary to assure the proper functioning of the judiciary are compelling state interests and appropriate activities of the bar, and may be financed through compulsory dues. A functional role of the bar association, therefore, would be to assist the judiciary in carrying out those activities necessary in order to assure the proper functioning of the judicial system.

Such an analysis would begin with a discussion of the proper func-

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grated bar would be an appropriate place to begin this analysis, but most integration rules and statutes are worded in very broad and general terms. The typical language is "the advancement of the science of jurisprudence and the effective administration of justice." *See, e.g., Model Bar Organization Act*, 10 J. AM JUDICATURE SOC. 110-12 (1926); *Bar Organization Act*, 4 J. AM. JUDICATURE SOC. 111-14 (1920).

125. Black's Law Dictionary defines "function" as "[t]he nature and proper action of anything; activity appropriate to any business or profession." BLACK'S LAW DICTIONARY 605-06 (5th ed. 1979), *see also* Rosenblum v. Anglim, 43 F. Supp. 889, 892 (N.D. Cal. 1942). A similar test was applied in the separation of powers context to determine the extent of the judiciary's inherent authority. *See* Kalish, *supra* note 3. The court in Petition of Chapman, 128 N.H. 24, 509 A.2d 753 (1986), addressing compelled financial support of a bar association proposed a different but related test. The *Chapman* court proposed a substantive versus procedural test stating that the bar may lobby on issues of procedure but may not lobby to change the "substantive content of legal rights and obligations." *Id.* at 37, 509 A.2d at 762 (Souter, J., concurring). Noting a distinction implicit in *Lathrop* between the administration of justice and the content of the law that is administered, *id.* at 37, 509 A.2d at 763, the court opined that financial support of the former would be permissible but not that of the latter.

The Nebraska Supreme Court has apparently followed a similar approach in early cases dealing with the legal profession. In State *ex rel* Ralston v. Turner, 141 Neb. 556, 4 N.W.2d 302 (1941), the court discussing bar admission qualifications quoted the following language from a Wisconsin decision: "[s]uch legislative qualifications do not constitute the ultimate qualifications beyond which the court cannot go in fixing additional qualifications *deemed necessary by the courts for the proper administration of judicial functions.*" *Id.* at 570, 4 N.W.2d at 310 (quoting *In re* Cannon, 206 Wis. 374, 240 N.W. 441 (1932)) (emphasis added).

tion of the bar association and the governmental interests it serves.[126] The analysis would continue by questioning whether a particular bar association activity is important to assure the proper functioning of the judicial process *or* whether it is to advance the public good.[127] If the former, ultimate authority should rest with the judiciary and, possibly, the bar association; if the latter, the ultimate authority should rest with the legislature. The legislature is the political branch of the government that should decide issues relating to the public good. Its democratic processes are better able to decide these policy questions independent of the bar association. "The functional approach insists that public policy judgment be left to the legislature."[128]

The Supreme Court, implicitly in *Lathrop* and explicitly in *Goldfarb v. Virginia State Bar*,[129] recognized that the state interest over lawyers is compelling. The concurrence in *Falk I* identified the compelling state interests promoted by the integrated bar as the "administration of justice and the advancement of jurisprudence."[130] Recognizing that such principles are susceptible to varying interpretations it was stated:

> On the one hand, the bar represents the collective experience of legal experts in many fields, and its views on legislation as substantive as revisions of the criminal code, changes to the divorce laws, and no-fault insurance may serve compelling state interests. On the other hand, the threatened and actual intrusions upon individual members' First Amendment rights occasioned by compelled support of substantive issues to which they are opposed may make it proper or even constitutionally necessary to limit this broad statement of pur-

126. One leading scholar has argued, using a similar functional approach, that bar association membership is not strictly necessary to assure the proper functioning of the judicial process. Kalish, *supra* note 3, at 599. "In view of the Association's special status as a unified bar. . . . [T]he Association should limit its activities before the General Court to those matters which are related directly to the efficient administration of the judicial system; the composition and operation of the courts; and the education, ethics, competence, integrity and regulation as a body, of the legal profession." Petition of Chapman, 128 N.H. at 24, 32, 509 A.2d 753, 759 (1986).

127. This test is similar to one utilized to determine when the judiciary can mandate the appropriation of funds for its use. *See* Wayne Circuit Judges v. County of Wayne, 383 Mich. 10, 23, 172 N.W.2d 436, 440 (1969) (the court held that it could only demand money if its absence would impair the "effectively continuing function of the court"). Lobbying on substantive issues of social policy are not appropriate bar activities. "Despite the social significance of [such proposals], there is no reason to believe that [their] enactment would have any effect on the integrity or competence of the bar or bench." Petition of Chapman, 128 N.H. 24, 37, 509 A.2d 753, 763 (1986).

128. Kalish, *supra* note 3, at 599.

129. 421 U.S. 773 (1975). "We recognize that the States have a *compelling interest* in the practice of professions within their boundaries . . . . The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' " *Id.* at 792-93 (emphasis added).

130. *Falk I*, 411 Mich. 63, 145, 305 N.W.2d 201, 231 (1981).

> pose to the promotion of issues which are directly related to the practice of law and administration of justice as defined in their narrowest senses . . . or to eliminate entirely bar legislative activities funded by compulsory dues.[131]

A functional analysis of the bar association would result in a very narrow reading of the words "administration of justice and advancement of jurisprudence." Activities which would meet the functional analysis proposed herein might include: bar admissions, attorney discipline, continuing legal education, prevention of the unauthorized practice of law and other activities directly related to and having an immediate impact upon the judicial process. Activities that would clearly not be in accord with a functional analysis would include such activities as: lobbying efforts, political activities, bar social functions, and other related activities that are self-serving activities of the bar and the attorney as an individual. These activities do not embrace any governmental interests in the legal profession and could not justify any first amendment infringement. Further, these activities are not necessary to assure the proper functioning of the judicial process and, hence, do not meet the requirements of a functional analysis.

The application of the functional analysis proposed herein will not be easy. The demarcation between those activities necessary for the proper functioning of the judicial process and those that are not poses difficult and complex questions. The scope of the "judicial process" and the meaning of the words "strict necessity" are also issues that are difficult to resolve. Nevertheless, if the courts are going to begin to address these difficult questions there must be a starting point or an analytical framework in order to keep the inquiry focused. As I have already shown, the integration debate has been circular and has not made any progress over the last seventy-five years. In order to make the needed progress in this area a framework such as the functional approach proposed in this article is needed.

B. Least Restrictive Means

If an activity passes the muster of the functional test as I have proposed, the means employed to further the compelling state interest must nevertheless be the least restrictive alternative available to the government to further the state interest.

In the integrated bar context there are alternatives available to the government which would further the state's interest in the legal profession while at the same time alleviate first amendment infringements. These alternatives would alleviate the first amendment associational problems of the integrated bar. Compulsory bar membership is not the least restrictive alternative. The government could allow dissident bar members to withdraw their bar membership and

131. *Id.* at 172, 305 N.W.2d at 244.

require them to pay a "service fee" to the bar association equal in amount to their pro rata share of the costs for bar activities which they must bear as a responsible member of the profession. This would be akin to the agency shop agreement considered in *Abood*. However, it must also be assured that those who choose not to join the bar are paying for activities of the bar which serve only compelling state interests. Such a proposal would eliminate the problem of "free riders" in the profession while still protecting the first amendment rights of all attorneys. You will recall that the free rider problem was a very important consideration of the Court in *Abood*.

Short of allowing dissident members to withdraw from the bar association and make bar membership voluntary, other less restrictive alternatives might entail a prohibition on activities that do not meet a compelling state interest or the use of procedural safeguards to lessen any first amendment infringements from compelled financial support of the bar.

C. Procedural Protections

In addition to a constitutional problem, the compelled support of activities objectionable to dissident members presents a procedural problem of apportioning the dues which may be compelled over objection and those that cannot. I will now return to two cases that have previously been discussed, however in this portion of the article specific reference will be made only to the relief proposed by the courts. The cases are *Abood* and *Arrow*.

Again as a reminder, *Abood* dealt with compelled financial support of a union's activities over objection by dissenting non-members that were compelled to finance the collective bargaining activities of the union. The Supreme Court held that the dissident non-members could only be required to finance those activities of the union which were germane to its collective bargaining activities. Since the union was using the dissident's dues for other purposes, the Court had to discuss an appropriate remedy.

A remedy in *Abood* had to be tailored which would provide for contributions from dissident members for activities germane to collective bargaining, yet it must also ensure that dissidents were not financially supporting activities unrelated to collective bargaining. It was clear that limiting the use of actual dollars collected from dissenting employees to collective bargaining purposes was not an adequate remedy. To do so would result in dissenting employees paying a disproportionate share of the collective bargaining activities.[132]

132. *See also* Retail Clerks Int'l Ass'n Local 1625 v. Schermerhorn, 373 U.S. 746, 753-54 (1963). It is clear that merely limiting the use of dissenting member's dues to activities which further a compelling state interest without a reduction in the

Therefore, the Court was required to discuss other alternate forms of relief. As a preliminary matter, only those dissenters having made it affirmatively known to the union that they opposed the expenditure of funds for political and ideological purposes would be entitled to relief because "dissent is not to be presumed."[133]

The Court proposed two forms of relief that would be appropriate under the circumstances and which were also discussed in *Street*. The relief the Court proposed was:

> First, an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys exacted from him as is the proportion of the union's total expenditures made for such political activities to the union's total budget; and second, restitution of a fraction of union dues paid equal to the fraction of total union expenditures that were made for political purposes opposed by the employee.[134]

This early view on the appropriate type of remedy was later followed by the courts that dealt with this similar problem in the bar association context. For example *Arrow* followed the principles established in *Abood* in forming the appropriate relief for a dissident bar member who objects to the use of her dues for activities which do not further a compelling state interest.

In the first opinion in the *Arrow* case the court held that a bar association could not expend compulsory dues on legislative and lobbying activities. In a subsequent opinion in the same action the parties agreed to a stipulation which would resolve the issue.[135] The stipulation provided:

> The State Bar of New Mexico will adopt a check-off system to fund future

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dues is an unconstitutional remedy. Nevertheless, this is exactly the type of remedy which was recommended by the SENNETT COMMITTEE REPORT. The SENNETT COMMITTEE REPORT recommended that:

> A. That the House of Delegates should take action to allow the Bar Association to continue lobbying efforts without the spector of constitutional litigation being continually raised, and;
>
> B. The the Associaiton [sic] adopt a system whereby the members of the Bar can 'opt out' of the Bar Association lobbying efforts, and;
>
> C. That the Association adopt a system whereby the funds of Bar members who do not desire to be involved in lobbying efforts can be placed in a segregated account to be used for the general betterment of the administration of justice.

SENNETT COMMITTEE REPORT, *supra* note 71 at 9. *See also infra* notes 165-70 and accompanying text.

133. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 238 (1977). The requirement that a dissenter must make it affirmatively known that they opposed the expenditure of funds for political purposes has been rejected and this burden must now be shouldered by the organization collecting the compulsory dues.

134. *Id.* at 238 (quoting Railway Employees' Dep't v. Hanson, 351 U.S. 225 at 774-75 (1956)). *See also* Railway Clerks v. Allen, 373 U.S. 113 (1963) (a similar remedy was fashioned in *Street*).

135. Arrow v. Dow, 554 F. Supp. 1086 (D. N.M. 1983).

> lobbying whereby those Bar members who disagreed with the use of their funds for lobbying purposes could obtain, after the close of the legislative session, a pro rata refund of their portion of Bar dues spent on lobbying. Under this check-off system, all Bar members will pay their full dues as assessed, the Bar will issue a lobbying report as soon as practicable after the lobbying activities have concluded for the year (said report to include a list of issues lobbied upon and the Bar's position on each issue), and the Bar will advise its membership that those members who disagreed with the use of a portion of their dues for lobbying can request and receive a pro rata refund.[136]

However, the stipulated remedy proposed in *Arrow* is clearly not satisfactory given the requirements in *Abood* and the subsequent opinion in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*,[137] for three reasons. First, under the stipulation the Bar would gain the use of the dissenting members funds until the close of the legislative session and the eventual refund is tendered. Second, the *Arrow* court held that legislative lobbying activities were not appropriate activities of the bar, therefore, bar dues should not be used for this purpose. If the Bar is to perform these functions it must do so through voluntary contributions. To allow the bar to exact funds for purposes that cannot be compulsorily financed and then use these funds until the end of the session does not lessen the first amendment infringement. And third, if a "check-off" system is to be used, then those members that desire to fund legislative lobbying efforts should be checked off not those members dissenting from such activity. The dissenter should not be the party who must come forward to prevent her dues from being used in an impermissible manner. In addition, the stipulation would require the dissident member to check-off *each* activity which she opposed. Such a system would place an onerous burden on the dissenting member.

The Supreme Court in *Abood* suggested that the system, advocated in *Arrow*, would not be appropriate. "To require greater specificity would confront an individual . . . with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure."[138] Thus the dissenting member must be given the opportunity for a general objection which would not require a specific enumeration of those activities to which she objected. Further, any

136. *Id.* at 1086-87.

137. 466 U.S. 435 (1984).

138. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 241 (1977). The Court similarly recognized in Buckley v. Valeo, 424 U.S. 1, 64 (1976), that compelled disclosure of political campaign contributions and expenditures "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *See also* Gibson v. The Fla. Bar, 798 F.2d 1564, 1570 n.5 (11th Cir. 1986) ("Lawyers would only have to notify the Bar of a general disagreement, since the first amendment also protects an individuals right *not* to disclose his beliefs.") (emphasis in original).

burden created by such a system must be borne by the bar association and not by the captive member.

The remedies which have been fashioned in virtually every case holding that a bar association can only spend compulsory dues for limited purposes have relied on the decision in *Abood*.[139] Although correct at the time, these cases and the remedies proposed are no longer adequate. The Supreme Court's decision in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*[140] has expressed an opinion on the procedural remedy which would limit further first amendment infringements caused from exacting compulsory dues.

I will now address two post-*Abood* decisions that are useful in guiding the courts on this difficult issue. The first is *Ellis* and the second is *Chicago Teachers Union v. Hudson*.[141]

The question presented in *Ellis* was essentially the same issue which was presented, but not decided, in *Street*. Specifically the constitutionality of union "expenditures for activities in the area between the costs which led directly to the complaint as to 'free riders', and the expenditures to support union political activities."[142]

The union adopted a rebate scheme to return a portion of the dues assessed which represented the pro rata portion of fees used for political and ideological purposes.[143] The dissident members challenged the adequacy of the rebate scheme and also the legality of six specific union expenditures which fell between the extremes identified in *Hanson* and *Street*. The challenged expenditures were: a quadrennial convention, litigation not related to collective bargaining, union publications, social activities, death benefits for employees, and organizing efforts.[144]

The Court first considered the adequacy of the rebate program instituted by the union as a means of protecting the rights of dissident members for monies spent on political and ideological purposes. The Court recognized that "[b]y exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization."[145] Finding the system to be inadequate, the Court expressed an opinion on the appropriate remedial measures to be taken by unions in this situation.

The only justification for this union borrowing would be administrative con-

139. *See supra* note 114.
140. 466 U.S. 435 (1984).
141. 475 U.S. 292, 106 S. Ct. 1066 (1986).
142. Machinists v. Street, 367 U.S. 740, 769-70 (1961).
143. Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, 466 U.S. 435, 440 (1984).
144. *Id.*
145. *Id.* at 444.

> venience. But there are readily available alternatives, such as advance reduction of dues and/or interest bearing escrow accounts, that place only the slightest additional burden, if any, on the union. Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily.[146]

The Court then considered the specific activities to which the dissenters objected. The Court upheld the use of dissenter's fees for social activities, union publications, and a quadrennial union convention to elect union officers and conduct business related to collective bargaining.[147] The Court, however, found that the organizing activities of the union and litigation expenses not related to collective bargaining were not authorized.[148] Since the Court found that the Act allowing the union shop only authorized the compelled support of three activities, the first amendment review was limited to those three activities. However, the first amendment review of these activities was very cursory and had the practical effect of a summary dismissal of these claims.

The Court noted that the very existence of the union-shop impinged first amendment freedoms but that these infringements were outweighed by the strong governmental interest in industrial peace. The Court then held that the added financial support of the three activities complained of did not involve additional infringement beyond that already accepted.[149] Recently, however, the Supreme Court has imposed additional procedural safeguards to protect dissenters and limit first amendment infringements.

In a recent case, the Supreme Court imposed additional requirements to assure that proper procedural safeguards are given to those who disagree with the manner in which compulsory funds are spent by labor unions.[150] *Chicago Teachers Union v. Hudson*[151] addressed the constitutionality of the procedures adopted by the Chicago Teach-

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146. *Id.*

147. *Id.* at 448-51.

148. *Id.* at 451-55.

149. *Id.* at 456-57. The Court summarily dismissed the petitioners first amendment claims. In a perceptive dissent Justice Powell stated:

> The reasoning of the Court is not clear to me. It agrees, as it must, that the First Amendment 'does limit the uses to which the union can put funds obtained from dissenting employees,'. . . . Nevertheless the Court's conclusion with respect to convention expenses appears to ignore that constraint . . . . Where funds are used to further political causes with which nonmember employees may disagree, the decisions of this Court are explicit that nonmember employees may not be compelled to bear such expenditures. The Court's conclusionary disposition of petitioners' argument ignores the force of these decisions.

Id. at 461 (Powell, J., dissenting). *See also* Keller v. State Bar of California, 190 Cal. App. 3d 1196, 1214, 226 Cal. Rptr. 448, 468 (1986).

150. Chicago Teachers Union v. Hudson, 475 U.S. 292, 106 S. Ct. 1066 (1986).

151. *Id.*

ers Union to draw the necessary line between those activities which could be financed through compulsory sources and those that could not and also to respond to objections concerning the manner in which the line was drawn. The Court's decision has placed new requirements on this type of procedural safeguard.

The Court stated that "the 'advance reduction of dues' was inadequate because it provided nonmembers with inadequate information about the basis for their proportionate share."[152] This language, taken in conjunction with the language which follows, forms the basis for the first added requirement imposed in the *Chicago Teachers Union* case.

> Basic considerations of fairness, as well as concerns for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee. Leaving the non-union employee in the dark about the source of the figure for the agency fee — and requiring them to object in order to receive information — does not adequately protect the careful distinctions drawn in *Abood*.[153]

This requirement thus places the burden upon the union, or by analogy the bar association, to provide dissenters with adequate information to determine how the organization apportioned the expenditures on authorized and unauthorized activities. This requirement was deemed necessary to allow the "individual whose First Amendment rights are being affected . . . a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim."[154]

The second requirement imposed in *Chicago Teachers Union* was the requirement of an impartial decisionmaker.

> Finally, the original Union procedure was also defective because it did not provide for a reasonably prompt decision by an impartial decisionmaker. Although we have not so specified in the past, we now conclude that such a requirement is necessary.[155]

Although the union had established a 100% escrow arrangement for contributions exacted from dissenters, thus preventing their use for impermissible purposes, the Court held that the procedure was inadequate because "it does not provide an adequate explanation for the advance reduction of dues, and it does not provide a reasonably prompt decision by an impartial decisionmaker."[156]

With all of these cases in mind, *Abood*, *Ellis*, and *Chicago Teachers Union*, I will now propose a procedural safeguard conforming to all the requirements of these Supreme Court mandates.

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152. *Id.* at —, 106 S. Ct. at 1075.
153. *Id.* at —, 106 S. Ct. at 1076.
154. *Id.* at —, 106 S. Ct. at 1074.
155. *Id.* at —, 106 S. Ct. at 1076 (footnotes omitted).
156. *Id.* at —, 106 S. Ct. at 1077.

D. The Proposed Remedy

If the conclusion is reached that a dissident bar member cannot be compelled to financially support bar association activities which she opposes, then there remains a procedural problem of how the fees will be apportioned. There must be a procedure devised which will assure that the objecting member is paying for the activities of the bar furthering a compelling state interest, yet it must also provide for a process of apportioning the dues and returning that portion representing the pro rata share which would have been spent unconstitutionally. The final issue addressed by this article is the appropriate procedure to insure that bar expenditures are not being compelled over objection and that a constitutional process is developed conforming to the constitutional rights of the dissident bar member.

I propose a procedure that informs all members of their right to object to bar expenditures and that places the burden of informing the bar members on the bar association. Additionally, the procedure would require the bar to place the dues of an objecting member into an escrow account until an accounting could be conducted. After the accounting, the bar association could assess a percentage of its costs, which represents those activities determined to further a compelling governmental interest to all members. All other activities of the bar must be financed by voluntary contributions. During the first year in operation the percentage of the dues appropriately compelled would be set-off against the dues held in escrow, with the balance being returned along with the accrued interest to the dissident member. In subsequent years, the dues assessed to dissident members would be the amount which represented compelled assessments in the previous year, with any shortfall at the close of the year being charged to the dissident and any excess being returned, again with interest.

The final requirements of the procedural remedy would include detailed information be given to the dissenters explaining how their compulsory obligations were calculated. Also, the bar association would have to provide an impartial decisionmaker to render, in a reasonably prompt manner, a decision concerning the dissident members objections. These final requirements would conform to the Court's decision in *Chicago Teachers Union*.

Another remedy exists which would provide the greatest constitutional safeguards for dissenters. This remedy entails completely prohibiting a state bar from engaging in any activity which does not meet a compelling state interest. Such a remedy was urged by the Petitioner in *Petition of Chapman*[157] and ultimately adopted by the court. "[P]etitioner here argues strenuously that dues abatement of the sort suggested by the United States Supreme Court in various

157. 128 N.H. 24, 509 A.2d 753 (1986).

union shop cases . . . is an inadequate remedy because the [bar will] still be able to engage in the complained of legislative activity."[158] The available remedies were further elaborated on in a concurring opinion. The option of eliminating *all* lobbying as a remedy was summarily dismissed because to do so "would ignore the real public service that the [bar] provides when it lobbies on issues that are germane to its responsibilities as a unified bar association."[159] The second option discussed was a system of dues abatement. This option was considered unsatisfactory because "calculating a proper reduction of dues would be extremely complicated" and "after the dues are reduced by some trifling amount, a dissenter is still compelled to belong to an association officially advocating views with which he disagrees, on a subject outside of the scope of those responsibilities that are accepted as justifying his mandatory membership."[160]

The favored remedy was to impose limits on the scope of lobbying activities. The concurrence explained the predominance of the remedy of dues reduction and the reluctance to allow injunctive relief in the analogous labor cases. The reluctance to use injunctive relief was explained as being consistent with the Congressional policy behind the Norris-Laguardia Act,[161] and the concern that an injunction "against a union's political or ideological activities would affect the first amendment rights of those members who desire to associate for political purposes."[162] Such constraints were not applicable in the context of compelled financial support of a bar association. First, there is no Congressional policy forbidding injunctive relief and, second, the first amendment rights of those that favor the questioned bar activity will not be threatened because of the availability of voluntary associations "that would lend [themselves] to the purposes of such opposition, and there are genuine opportunites for effective organization devoted to the particular legislation in issue."[163] Therefore there would be no legal obstacles to prevent a court from granting injunctive relief and limiting the legislative activities of a bar association.

A fourth remedy which has only been discussed once is the remedy of requiring the state bar officers to reimburse funds used for improper lobbying. The court in *Keller* held that "[t]he individual defendants [bar officers] may be held, upon a proper showing, to reimburse the State Bar for expenditure of funds which are in excess of the bar's statutory powers."[164]

158. *Id.* at 30-31, 509 A.2d at 758.
159. *Id.* at 40, 509 A.2d at 764 (Souter, J., concurring).
160. *Id.*, 509 A.2d at 765.
161. 29 U.S.C. § 101 *et seq.* (1982).
162. Petition of Chapman, 128 N.H. 24, 40, 509 A.2d 753, 765 (1986).
163. *Id.*
164. Keller v. State Bar of California, 190 Cal. App. 3d 1196, 1214, 226 Cal. Rptr. 448, 473 (1986) (footnotes omitted).

E. Nebraska's Proposed Remedy

The Sennett Committee was formed to study the issue of using mandatory bar dues for legislative lobbying. The Sennett Committee Report stated:

> A review of these authorities has convinced us that the current policies of the Nebraska State Bar Association are inadequate. Without attempting to summarize the holdings of the above cases, we would simply note that the bar associations have not been winning these lawsuits. We believe that it is fair to say that in light of the authorities listed above, the Nebraska State Bar Association would have a very difficult time defending its current lobbying practices.[165]

The Sennett Committee Report discussed four possible solutions to the constitutional problem. First, the association could drop its legislative activities altogether. This would in turn eliminate the legislative budget of the association. Second, the association could resort to voluntary funding of legislative activities. Under such a plan, contributions would not be a part of the regular dues collected. To further this plan, a separate non-profit corporation could be organized to carry out the legislative activities. The third option, which was the option recommended to and adopted by the House of Delegates involved a check-off system to accomodate dissenters. The final option considered by the committee was a rebate system.[166]

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165. SENNETT COMMITTEE REPORT, *supra* note 71 at 5.

166. *Id.* at 7. The fourth option was described by the committee as follows:

> The last course of action would be a rebate system. Here a dissenter is not allowed to reduce his dues by any amount spent for legislation purposes. Rather, to protect the dissenter's First Amendment constitutional rights, the dissenter may, by *affirmative action only*, petition the Bar Association claiming an aliquot refund of dues expended for the legislative effort. The rebate *could be limited to amounts spent to lobby a specific bill or bills*, or the rebate could relate to the legislative budget considered as a whole. Absent affirmative action, a dissenter will not enjoy any reduction in total dues assessed.

Id. at 7-8 (emphasis supplied). It is absolutely clear that the fourth option considered by the Committee would violate Supreme Court precedent which has been already discussed in this article. First, the burden of affirmatively objecting to an improper bar expenditure cannot be placed on the dissenting bar member. Further, it is clear that a dissenter is not required to specify the activities with which she disagrees. *See supra* notes 138, 153-55 and accompanying text. "Disclosure of the specific causes to which an individual employee is opposed (which necessarily discloses, by negative implication, those causes the employee does support) may subject him to 'economic reprisal, . . . threat of physical coercion, and other manifestations of public hostility,' and might dissuade him from exercising the right to withhold support 'because of fear of exposure of [his] beliefs . . . and of the consequences of this exposure.' " Abood v. Detroit Bd. of Educ., 431 U.S. 209, 241 (1976) (quoting NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449, 462-63 (1958)). It is difficult to understand why the committee members would even discuss such clearly flawed solutions. Indeed the Committee Report expressly noted some of the requirements imposed by the Supreme Court's decision in *Chicago Teachers Union v. Hudson*, but failed to incorporate those requirements in its recommen-

The Sennett Committee proposed a rule change for the Supreme Court Rules which would implement the recommendation of the Committee. The Rule as amended by the House of Delegates provides:

> Section 4(A): LOBBYING AND RELATED ACTIVITIES
>
> (i) The Bar Association may use dues to analyze and disseminate to its members information on proposed or pending legislative proposals.
>
> (ii) All lobbying activities shall be subject to the following restrictions. The annual dues notice shall offer the members of the State Bar an opportunity to direct that the stated amount of their dues intended for lobbying activities be placed instead in a restricted account. Funds from this account shall be budgeted by the Executive Committee for activities which will promote the administration of justice or improvement of the legal system. The established budget for lobbying activities shall be reduced by the amount that is directed to the restricted account.[167]

This Rule change is currently pending approval of the Nebraska Supreme Court. The Sennett Committee felt that the adoption of their recommendations and proposed rule would cure the constitutional problems for which the Committee was organized. I believe, however, that the proposed rule is inadequate for several reasons. First, the rule only limits lobbying activities of the bar. Thus, other activities with which a bar dissenter may disagree are not dealt with in the proposed rule. Second, the rule also fails to establish an impartial decisionmaker as required by the Supreme Court's decision in *Chicago Teachers Union v. Hudson*.[168] Third, the rule as proposed also places an undue burden on the dissenter.[169] The rule requires the dissenter to "opt out." The burden on the dissenters, however, could be alleviated by requiring those bar members that wish to support the bar's legislative lobbying efforts to "opt in." Such an allocation of the burden would conform to the Supreme Court's mandates. The practical effect of such an "opt-in" rule would establish a method of financing lobbying activities similar to a system of voluntary contributions.

Since the established budget for lobbying activities will be reduced by the amount of the dissenter's dues that are placed in the restricted account, the rule does prevent the dissenters from subsidizing the bar's lobbying activities. The result is that only those who support lobbying activities are financing these activities. However, this does not negate the fact that the coercive powers of the bar are being used to implement the program. The proposed rule also has the effect of allowing the bar to "appropriate" funds for lobbying purposes. The bar will be able to arrive at its desired level of lobbying activity by consid-

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dations to the House of Delegates. *See* SENNETT COMMITTEE REPORT, *supra* note 71 at 4.

167. SENNETT COMMITTEE REPORT, *supra* note 71.

168. 475 U.S. 292, 106 S. Ct. 1066 (1986).

169. *See supra* note 166.

ering the number of expected dissenters when setting the initial budget for lobbying activities. Thus, reducing the budget by the amounts placed in the restricted account from the artificially inflated initial budget will still result in a level of lobbying activity which is determined by the bar leadership and not the bar membership. The level of lobbying activity under the proposed rule is likely to be higher than the level of lobbying activity under a purely voluntary system of contributions. And this disparity can only be attributed to the coercive powers of the state bar in implementing the proposed rule.

The proposed rule also does not address the concern that the position of the bar will be imputed to dissenting bar members whether or not they are financing the lobbying activities of the bar.

Finally, the proposed rule does not provide for restitution to the dissenter of the portion of her bar dues which correspond to the percentage used for lobbying activities. Although not clear, the decisions of the Supreme Court seem to contemplate restitution to the dissenter.[170] Thus, placing these funds in a restricted account may not cure the constitutional violations. Because these problems still exist in the implementation of the proposed rule it may have been preferable for the bar to adopt either the first or second option considered by the Sennett Committee. These options were the elimination of bar legislative activities altogether or, alternatively, voluntary funding of legislative activities which would be carried out by a separate nonprofit corporation organized for that sole purpose.

V. CONCLUSION

In summary, this article has developed the evolution of the integrated bar debate from the early rejection of an integrated bar to the acceptance of an integrated bar of limited duties and functions. I have analyzed the cases which are applicable to the integrated bar in order to better understand the current challenge. The decisions in *Hanson*, *Street*, *Lathrop*, and, most importantly, *Abood* help to understand the issue, but fail to provide a framework for analysis of this current challenge to the compelled financial support of bar association activities which are disapproved by dissident members.

None of these cases explicitly identify the type of analysis used to decide the issue. After careful analysis of these and other Supreme Court precedents, I submit that in order to compel financial support of its activities the bar association must meet the burden of establishing that the objectionable activity furthers a compelling governmental interest.

A discussion of the post-*Abood* cases which have applied the *Abood* analysis in the bar association context has also shown that none of the

170. *See supra* notes 134, 145, 146, 158 and accompanying text.

courts which have decided the issue have proposed an acceptable analytical framework for parsing out those activities for which the bar may compel financial support over the objections of dissenting members. I have therefore proposed a functional test for determining which of those activities are essential activities of the bar and which may be supported by mandatory bar dues. The activities identified through such a test further a compelling governmental interest. This test relies on language in the *Lathrop* decision as well as an adaptation of a similar analysis by an early commentator. Stated briefly, this analysis requires any bar activity in which financial support may be compelled to be so strictly related to the proper functioning of the judicial process that without the activity the judicial process would be hampered. This is a test of strict necessity, and is a very heavy burden to be met by the bar associations.[171] Any activities of the bar that do not meet the test proposed must be funded through voluntary contributions or other non-compulsory financial support. And, in addition to furthering a compelling governmental interest, the means invoked must be the least restrictive alternative available.

If it is determined that an activity is appropriately financed by all members of the bar the constitutional analysis is still not yet complete; there may also be constitutional infirmities in the procedural protections afforded to those dissident bar members who object to the use of their bar dues for other purposes. The Supreme Court in *Ellis* has established guidelines to which states must adhere in order to avoid further first amendment infringement. The principles in *Ellis* make it clear that any procedure employed must not allow the improper use of dues by the bar association, even if only temporarily.

The procedure which I propose places the burden on the bar association to inform all members of their right to object to bar expenditures.[172] The procedure would also require the bar association to place the dues of an objecting member into an escrow or other interest bearing account until an accounting could be conducted. After the accounting, the bar association could assess to all members a percentage of its costs which represents those activities determined to further a compelling interest. All other activities of the bar would have to be financed by voluntary contributions or other non-compulsory financial support. During the first year in operation, the percentage of the dues

171. "Where it can reasonably be argued that an issue is outside the scope of its authority, the [bar] should take no position on the matter. Where substantial unanimity does not exist or is not known to exist within the bar as a whole, particularly with regard to issues affecting members' economic self-interest, the [bar] should exercise caution." Petition of Chapman, 128 N.H. 24, 32, 509 A.2d 753, 759 (1986).

172. "[K]eeping in mind that it is the Bar which bears the burden of proving the validity of its lobbying expenditures." Keller v. State Bar of California, 190 Cal. App. 3d 1196, 226 Cal. Rptr. 448, 469 (1986).

appropriately compelled would be set-off against the dues held in escrow, with the balance being returned along with the accrued interest to the dissident member. In subsequent years, the dues assessed to dissident members would be the amount which represented compelled assessments in the previous year, with any shortfall being charged to the dissident and any excess being returned.

These procedures would insure the dissident bar member is only paying for those activities of the bar which further the states' compelling interests in the legal profession; while limiting further first amendment infringement.

In this article I have essentially developed the evolution of the integration debate, developed an analysis that may be useful in the context of the current challenge, and proposed a system for protecting the dissident bar member's interest in the manner in which his dues are spent. I hope to have contributed to the commentary in this difficult area in a productive way. Even if my analysis should prove faulty or unworkable it provides a starting point and provides the proper direction and focus the inquiry should take.

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